TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 324.

WILLIAM TOOP, EMMA MOSSELWHITE, ET AL., PLAINTIFFS IN ERROR,

vs.

ULYSSES LAND COMPANY, THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, AND WILLIAM GASKILL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 26, 1914.

(23,014)

(23,914)

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INDEX.

	Original.	Print
Title of cause	1	1
Appearances	1	1
Petition	3	1
Summons and return (omitted in printing)	8	4
Demurrer of defendant Ulysses Land Company	10	4
Demurrer of defendant Northwestern Mutual Life Ins. Co.	10	5
Præcipe for entry of decree *pro confesso* as to Wm. Gaskill (omitted in printing)	11	5
Decree *pro confesso* as to Wm. Gaskill (omitted in printing)	11	5
Demurrers overruled	11	5
Memorandum opinion	12	5
Defendants assigned to answer (omitted in printing)	12	
Defendant Ulysses Land Company given further time to answer (omitted in printing)	13	
Answer of defendant Ulysses Land Company	13	6
Answer of defendant Northwestern Mutual Life Ins. Co.	16	8
Demurrer to answer of defendant Ulysses Land Company (omitted in printing)	18	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1914.

	Original.	Print
Demurrer to answer of defendant Northwestern Mutual Life Ins. Co. (omitted in printing)	19	
Demurrer to defendant's answer overruled (omitted in printing)	19	
Plaintiffs' motion to amend petition	19	9
Stipulation as to amendment to petition	20	10
Stipulation of fact and waiver of a jury	20	10
Exhibit A—Deed, Palmer *et ux.* to Ulysses Land Company.	22	12
Cause called for trial.....(omitted in printing)..	25	13
Reply to answer of defendant Ulysses Land Company	25	
Reply to answer of defendant Northwestern Mutual Life Ins. Co.	27	14
Judgment	28	15
Memorandum opinion	29	15
Petition for writ of error.....(omitted in printing)..	31	
Assignment of errors.....(" ")..	32	
Bond on writ of error and approval	37	17
Writ of error allowed	38	18
Agreed stipulation of facts certified by the court	39	18
Praecipe for transcript of the record....(omitted in printing)..	43	
Original citation with endorsements	45	22
Original writ of error	46	23
Clerk's return on writ of error	48	24
Specification of errors and designation of parts of record to be printed	49	24

1–2 In the United States District Court in and for the District of Nebraska, Lincoln Division.

Transcript of the Record on Writ of Error to the United States Supreme Court.

In the United States District Court, District of Nebraska, Lincoln Division.

Number 26. Law Docket.

WILLIAM TOOP, JOHN TOOP, EMMA MUSSELWHITE, HENRY EDWARD Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard, and Robert Orchard, Plaintiffs,

v.

ULYSSES LAND COMPANY, a Corporation; THE NORTHWESTERN Mutual Life Insurance Company, and William Gaskill, Defendants.

Appearances.

For Plaintiffs: Crane & Boucher, Omaha, Nebraska; Bulkley, Gray & More, No. 518 Home Ins. Bldg., Chicago, Ill.

For Defendants: J. M. Stewart, Lincoln, Nebraska; R. S. Norval, Seward, Nebraska, for Defendant, Ulysses Land Company; Hall & Bishop, Lincoln, Nebraska, for Northwestern Mutual Life Insurance Company.

Pleas Before Honorable Thomas C. Munger, Judge of the United States District Court, District of Nebraska, at the May, 1913, Term of the Lincoln Division of said District.

3 Be it remembered, That on the respective dates hereinafter designated, orders were entered and documents filed in the office of the clerk of the United States District Court in and for the District of Nebraska, Lincoln Division, in the case of William Toop et al. v. Ulysses Land Company et al., as herein fully set forth.

Petition.

Filed January 31, 1912.

Come now the above named plaintiffs and for their cause of action against the above named defendants, the plaintiffs represent and show:

First. That the plaintiffs, and each of them, are now and always have been residents and citizens of England, and are subjects of the

Kingdom of Great Britian and Ireland; that the defendant, Ulysses Land Company is a corporation organized and doing business under and by virtue of the laws of the State of Nebraska, and is a citizen of the State of Nebraska; that The Northwestern Mutual Life Insurance Company is a corporation organized and doing business under and by virtue of the laws of the State of Wisconsin, with an office and principal place of business in the State of Nebraska; that William Gaskill is a citizen and resident of the State of Nebraska; that all of the above named defendants are residents of Lincoln Division of the District Court of the United States for the District of Nebraska; that the matter or amount in controversy, exclusive of interest and costs, exceeds the value or sum of Three Thousand Dollars ($3,000).

4 Second. That the plaintiffs have a legal estate in and are the owners and are entitled to the immediate possession of an undivided two thirds interest in the following described premises, to-wit:

The South Half (½) of the Southwest quarter (¼) of Section Thirty (30) in Township Thirteen (13) North of Range Two (2) East of the Sixth Principal Meridian, and the North half (½) of the Northeast quarter of Section Thirty-six (36) Township Thirteen (13), North of Range One (1) East of the Sixth Principal Meridian, in Butler County, Nebraska.

Third. That the plaintiffs allege that on the Twenty-eighth day of July, 1898, one John Toop, then a resident of Ulysses, Nebraska, dies, intestate seized in fee and possessed of the afore described premises and leaving him surviving Sarah J. Toop his widow, who was to use, enjoy and possess the whole of the aforesaid premises during her natural life; that the said Sarah J. Toop died on or about the Ninth day of November, 1907.

Fourth. That said John Toop was married but once and then to said Sarah J. Toop; that no children were born of said marriage; that at the time of his death he left him surviving Sarah J. Toop, his widow, and:

(*a*) The children and grand-children of Mary Ann Plowman, a deceased sister, as follows: Sarah J. Dyer and Emma Tremlin, children, and William J. Toop, Jesse Toop and Florence Behrend, grand-children:

(*b*) The children and grand-children of William Toop, a brother, as follows, William Toop and John Toop, sons, and Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, who were the children of Edna Toop, daughter of William Toop; and

(*c*) The children and grand-children of Betsey Orchard, a sister of deceased, as follows: Mary Eliza Orchard, Harriet Kate Orchard and Alice Rosianna Orchard, children of Joseph Orchard, a son of said Betsey Orchard; also Robert Orchard, son of Betsey Orchard, as the only heirs at law and next of kin.

Fifth. That plaintiffs have a legal estate in, are the owners of and are entitled to the immediate possession of an undivided

5 two-thirds of said premises—that is to say; That the plaintiffs, William Toop and John Toop each have a one-ninth in-

terest, that the plaintiffs, Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite each have a one-fifty-fourth interest in said premises; that plaintiff, Robert Orchard, has a one-sixth interest in said premises, and that the plaintiffs, Mary Eliza Orchard, Harriet Kate Orchard and Alice Rosianna Orchard each has an undivided one-eighteenth interest in said premises; that the Ulysses Land Company has an undivided one-third interest in the premises having acquired same by purchase, subsequent to the death of said Sarah J. Toop under conveyance by said Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, conveying all their right, title and interest in said premises as heirs at law of said John Toop; that the Northwestern Mutual Life Insurance Company has a lien or claim upon the interest in said premises of the Ulysses Land Company, by Virtue of a certain mortgage made and executed by the said Ulysses Land Company to the Northwestern Mutual Life Insurance Company on or about the Twenty-first day of January, 1910, to secure the sum of Six Thousand Dollars ($6,000) and that the said William Gaskill is in actual occupancy and possession of the whole of said premises, claiming to hold possession as a tenant thereof under the said Ulysses Land Company.

Sixth. That the defendants have been and now are wrongfully in possession of the whole of the afore described premises and deny the right of the plaintiffs to the possession and enjoyment of any portion of said premises, and unlawfully, wrongfully and unjustly with-old from plaintiffs the immediate possession of their said two-thirds interest in the afore described premises, and unlawfully, wrongfully and unjustly kept and still keep them out of the
6 immediate possession of same.

Seventh. Plaintiffs allege that under the laws of the State of Nebraska, the widow Sarah J. Toop, had the use and possession and the occupation of the whole of the aforesaid premises from the date of the death of the said John Toop in 1897 until her death in 1907, and that neither the plaintiffs nor the defendants had any right to the use and occupation or possession of the same or any part of it until after the death of said Sarah J. Toop.

Eighth. Plaintiffs claim their rights as heirs at law in and to said premises and claim an estate in fee in said premises as such heirs at law by virtue of the treaty between the United States and Great Britain, adopted and in force in 1900; that the defendant, Ulysses Land Company, has attempted to conceal from the plaintiffs their right or interest in said premises.

Ninth. Plaintiffs demand judgment and pray that they may be adjudged to be the owners of an undivided two-thirds interest in and to the premises herein described; that the defendant, Ulysses Land Company, may be adjudged to be the owner of an undivided one-third interest; that the claim of the Northwestern Mutual Life Insurance Company, by virtue of its mortgage, may be adjudged to have a lien only on the one-third interest of the said Ulysses Land Company in said premises, and that the said William Gaskill be adjudged to be a tenant of and for the plaintiffs as to the undivided

two-thirds of said premises; that the plaintiffs further demand judgment and pray that they be adjudged to be entitled to and be let into the immediate possession of an undivided two-thirds of said premises.

Tenth. The plaintiffs pray for judgment for the value of the use and occupation of the afore described premises since said 10th day of November, 1907, the date of the death of said Sarah Toop,
7–9 the widow of John Toop, the decedent, and while the plaintiffs have been excluded from said afore described premises by the defendants, and allege and aver that the value of the use and occupation of said premises is One Thousand Five Hundred and Four Dollars, ($1,504.00).

Eleventh. The plaintiffs further pray that the defendants may be required to pay to the plaintiffs the sum of One Thousand Five Hundred and Four Dollars, ($1,504.00) as damages on account of holding the possession of said premises from plaintiffs, together with their costs.

Plaintiffs pray that a summons may be issued, directed to the Marshal of said District, commanding that he summon the said Ulysses Land Company, the Northwestern Mutual Life Insurance Company and the said William Gaskill to appear before this court at the next term thereof, to be holden in the City of Lincoln, in said District on the second Monday in May, 1912, to plead, answer or demur to this petition.

CRANE & BOUCHER,
BULKLEY, GRAY & MORE,
Solicitors for Plaintiffs.

THOMAS D. CRANE,
C. E. MORE,
Of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

C. E. More, being first duly sworn, on oath deposes and says that he is one of the attorneys for the plaintiffs in the above cause and verily believes that the matters and things stated in said petition are true in substance and in fact.

C. E. MORE.

Subscribed and sworn to before me this 26th day of January, A. D. 1912.

[NOTARIAL SEAL.] C. PAUL TALLMADGE,
Notary Public.

* * * * * * *

10 *Demurrer of Defendant Ulysses Land Co.*

Filed March 2, 1912.

Comes now the defendant, Ulysses Land Company, and demurs to the petition of the plaintiff herein, for the reason that said peti-

tion does not state facts sufficient to constitute a cause of action in favor of said plaintiffs and against this defendant.

R. S. NORVAL,
STEWART, WILLIAMS & BROWN,
Attorneys for Defendant Ulysses Land Company.

Demurrer of Northwestern Mutual Life Insurance Company.

Filed March 13, 1912.

Now comes the Northwestern Mutual Life Insurance Company a Corporation and demurs to the plaintiffs' petition and states
11 as the reason for such demurrer that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant.

Wherefore defendant asks if it shall be required to make further answer.

HALL & BISHOP,
Attorneys for Defendant.

* * * * * * *

Journal Entry, Demurrers Overruled.

Entered June 27, 1912.

The demurrers to the petition herein are heard and overruled; to which ruling of the court defendant excepts.

12 *Memorandum Opinion.*

Filed June 27, 1912.

THOMAS C. MUNGER, *C. J.:*

This is an action in ejectment, and general demurrers have been filed to the petition. The question argued was whether plaintiffs, as non-resident aliens, could inherit certain lands in this state, from an intestate uncle, who left no issue, and who died in 1898, a resident and citizen of Nebraska.

The question is interesting as thus presented, of the proper construction of the Nebraska Statute, Sections 70 and 73 Chapter 73, Nebraska Compiled Statutes, but it has no basis in the pleadings. There is no allegation that the deceased was a citizen of the United States, or of Nebraska. The petition alleges that plaintiffs have a legal estate in these lands, and are entitled to the possession thereof, and that defendants unlawfully keep them out of possession. This is sufficient. (Nebraska Civil Code, Section 626.) The further allegations do not so negative or limit this general statement as to present the rights of the alien plaintiffs, in case the deceased was either a citizen or an alien, for neither status is pleaded. If it might

be assumed that the deceased was a resident alien, there is no allegation of the date when he became seized of these lands, nor is the petition inconsistent with proof that these lands were within the limits of an incorporated city or town. (Sections 70 and 73, Chapter 73, Compiled Statutes of Nebraska.)

As the general allegations of the petition are declared sufficient by statute, and are not restrained by other allegations, the demurrers must be overruled.

* * * * * * *

13 *Answer of Defendant Ulysses Land Co.*

Filed September 7, 1912.

Comes now the Ulysses Land Company, defendant herein and for answer to the plaintiffs' petition alleges and says:

First. That the plaintiffs herein are now, and always have been residents and citizens of the Kingdom of Great Britain, and are not now and never were residents or citizens of the United States; that the defendant is a corporation organized and existing under the laws of the State of Nebraska.

Second. This defendant admits that John Toop, named in the petition, on the 28th day of July, 1898, was a resident of Ulysses, Nebraska, and on said date died without issue, and intestate, leaving Sarah J. Toop, his widow, who died about November 9, 1907, and admits that at the time of his death John Toop was the owner of the real estate described in the second paragraph of the petition filed herein, and this defendant alleges that said John Toop, at the time he acquired said real estate and thereafter until his death, was a citizen of the United States and a resident and citizen of the State of Nebraska.

Defendant admits the allegations of the Fourth paragraph of plaintiffs' petition.

14 Third. Prior to the commencement of this suit, this defendant sold and conveyed by warranty deed lots 1 in Block 3, in the Village of Ulysses, and Lots 1, 11 and 12, in Block 20 in the Town of Surprise, all in Butler County, Nebraska, and subsequent thereto defendant has not been in possession thereof nor owned or claimed any interest therein, and now disclaims all right and title to said real estate and to the possession thereof.

Fourth. Sarah J. Dyer, Emma Trimlin, William I. Toop, Jesse Toop and Florence Behrend, named in the Fourth paragraph of the petition herein were residents and citizens of the United States at the time of the death of said John Toop, and were then and now are his sole and only heirs at law to the real estate in controversy herein, to-wit: The North Half of the Northeast Quarter of Section Twenty-six Township Thirteen North, Range One, and the South Half of the Northeast Quarter of Section Thirty, Township Thirteen, North Range Two, in Butler County, Nebraska. That subsequent to the death of said John Toop the said Sarah J. Dyer, Emma Trimlin, William I. Toop, Jesse Toop and Florence Behrend sold and conveyed to one Frank Palmer all their right, title and interest in and

to said land and said Frank Palmer, on or about September 30, 1909 sold and conveyed said lands to this defendant, and none of said lands so conveyed as aforesaid at the time of the death of said John Toop, or any subsequent time, lay or was situated within the corporate limits of any city or town of the State of Nebraska.

Fifth. Admits that this defendant, on or about January 21, 1910 gave to the Northwestern Mutual Life Insurance Company a mortgage on said lands last described to secure the payment of its note in the sum of Six Thousand Dollars.

Sixth. Denies that the plaintiffs now have or ever had any right, title or interest in the lands described in the Fourth paragraph of this answer, and this defendant alleges the fact to be that the plaintiffs and each of them were at the time of the death of said John Toop non-residents of the State of Nebraska and aliens, and were then and always have been residents and citizens of the Kingdom of Great Britain, and were on that account not entitled to inherit the aforesaid real estate from such deceased under the laws of the State of Nebraska, and that the aforesaid Sarah J. Dyer, Emma Trimlin, William I. Toop, Jesse Toop and Florence Behrend, were the sole and only heirs of the said John Toop, deceased, and the title to the aforesaid lands vested in them under the laws of the state of Nebraska immediately upon his death.

Seventh. That the alleged cause of action of the plaintiffs, if any ever existed, is barred by the statute of limitations of the State of Nebraska, the same having accrued, as shown by the allegations of the petition, more than ten years prior to the commencement of this action.

This defendant denies generally the allegations of the plaintiffs' petition, except such as are herein specifically admitted.

Wherefore this defendant prays that this action be dismissed, and that defendant be allowed to go hence without day and recover its costs herein expended.

STEWART, WILLIAMS & BROWN AND
NORVAL BROS.,
Solicitors for Defendant Ulysses Land Co.

UNITED STATES OF AMERICA,
State and District of Nebraska, Lancaster County, ss:

John M. Stewart, being first duly sworn, on oath says he is one of the attorneys for the defendant Ulysses Land Company; that said Company is a corporation; that the facts set forth in the foregoing answer are true as affiant believes.

JOHN M. STEWART.

Subscribed and sworn to before me this 6th day of September, 1912.

[NOTARIAL SEAL.]

J. A. BROWN.

Answer of Defendant The Northwestern Mutual Life Insurance Company.

Filed September 11, 1912.

Comes now The Northwestern Mutual Life Insurance Company one of the defendants herein, and for its separate Answer to plaintiffs petition, says,

1. Admits that the plaintiffs herein are now and always have been residents and citizens of the Kingdom of Great Britain, that this defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin.

2. Admits that John Toop named in the petition, on the 28th day of July 1890 was a resident of Ulysses, Nebraska, and on said date died without issue and intestate, leaving Sarah J. Toop his widow, who died about November 9, 1907, and admits that at the time of his death, John Toop was the owner of the real estate described in the third paragraph of the petition filed herein; and this defendant alleges that said John Toop at the time he acquired said real estate and thereafter until his death, was a citizen of the United States and a resident and citizen of the State of Nebraska.

3. Defendant admits the allegations of the fourth paragraph of plaintiffs' petition.

4. Defendant alleges that Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend named in the
17 fourth paragraph in the petition herein, were residents and citizens of the United States at the time of the death of said John Toop and were then and now are his sole and only heirs at law, and as such heirs, took and inherited all the real estate in controversy herein to-wit: the North half (N. ½) of the Northeast quarter (N. E. ¼) Section 36, township 13 north, range 1 and the South half (S. ½) of the southwest quarter (S. W. ¼) of section 30, township 13 north, range 2, Butler County, Nebraska; that subsequent to the death of the said John Toop, the said Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, sold and conveyed to one Frank Palmer, all their right, title and interest in and to the above described land, and that the said Frank Palmer on or about September 30, 1909, sold and conveyed said land to the defendant herein, the Ulysses Land Company; that the Ulysses Land Company, on or about the 31st day of January, 1910 executed and delivered to this defendant, a mortgage on the above described lands for the purpose of securing the payment of its note in the sum of $6,000; that said mortgage is still in full force and effect and unpaid, and that this defendant has a first and prior lien by virtue of said mortgage for said sum.

5. Defendant denies that the plaintiffs or either of them now have or ever had any right, title or interest in and to the lands described in the 4th paragraph of this answer, and this defendant alleges the fact to be that the plaintiffs and each of them, were at the time of the death of said John Toop, non-residents of the State of Nebraska and aliens and were then and always have been residents and citizens of the

Kingdom of Great Britain and were on that account not entitled to inherit the aforesaid real estate or any part thereof from the said John Toop deceased under the laws of the State of Nebraska, and that the aforesaid Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend were the sole and only heirs of
18 the said John Toop deceased, and that the title to the aforesaid lands vested in them under the laws of the State of Nebraska immediately upon the death of the said John Toop.

6. Defendant aleges that the said cause of action of the plaintiffs if any ever existed is barred by the statute of limitation of the State of Nebraska, the same having accrued as shown by the allegations of the petition more than 10 years prior to the commencement of this action.

7. This defendant denies generally all of the allegations of the plaintiffs' petition except such as are hereinbefore specifically admitted.

Wherefore this defendant prays that this action be dismissed and this defendant be allowed to go hence without day and recover its costs herein expended.

HALL & BISHOP,
Solicitors for Northwestern Mutual Life Insurance Company.

UNITED STATES OF AMERICA,
State of Nebraska, Lancaster County, ss:

F. M. Hall being first duly sworn on his oath says that he is one of the attorneys for the Northwestern Mutual Life Insurance Company, that said Company is a corporation; that the facts set forth in the foregoing answer are true as affiant verily believes.

F. M. HALL.

Subscribed and sworn to before me this 7th day of September, 1912.

[NOTARIAL SEAL.] BERTHA DU TEIL,
Notary Public.

* * * * * * *

19 *Motion to Amend Petition.*

Filed January 22, 1913.

Come now the plaintiffs above named and move the Court for an order allowing them to amend clause (*b*) in the 4th paragraph of their petition by interlineation as follows:

By inserting after the words "as follows" in said clause, the words "William Toop and John Toop, sons, and"

To amend the 5th paragraph of the petition by interlineation, as follows:

By striking out the words "by virtue of said purchases of the rights in and to said premises of said Sarah J. Dyer, Emma Trem-

lin, William I. Toop, Jesse Toop and Florence Behrend" and by inserting in lieu thereof the following:

20 "Having acquired same by purchase subsequent to the death of said Sarah J. Toop under conveyances by said Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, conveying all their right, title and interest in said premises as heirs at law of said John Toop.

BULKLEY, GRAY & MORE,
CRANE & BOUCHER,
Attorneys for Plaintiff-.

Stipulation.

Filed April 3, 1913.

It is stipulated between the parties hereto that an order may be entered allowing the plaintiffs to amend their petition according to the terms of their motion recently filed.

CRANE & BOUCHER,
Attorneys for Plaintiffs.
R. S. NORVAL,
JOHN M. STEWART,
Attorneys for Defendants.

Stipulation of Facts.

Filed April 18, 1913.

It is agreed that this case shall be disposed of and judgment entered by the Court without a jury, upon the following facts, together with such additional facts as are contained in the pleadings of either of the parties, and admitted by the opposing parties, and such facts as may be proved at the trial:

1. That John Toop was born about the year 1826 in England, of English parentage, and became a naturalized citizen of the United States in about 1868 in the State of Illinois.

2. That he purchased the land involved in this action March 9, 1889 and continued to own the same until July 28, 1898, the

21 date of his death. That said real estate was not situate within the limits of or within any incorporated city or village.

3. That the said John Toop died at Ulysses, Nebraska, intestate: that is to say, without leaving any last will and testament, and that he was a resident and citizen of the State of Nebraska at the time of his death.

4. That Sarah J. Toop, his widow, had the use and possession of said land after the death of John Toop until November 9, 1907 the date of her death.

5. That John Toop left surviving him neither father, mother, children, brothers or sisters.

6. That all of the brothers and sisters of John Toop, towit: Mary Ann Plowman, William Toop and Betsy Orchard, as set forth in plaintiffs' petition, died prior to his death.

7. That the relationship of the parties to this action to said sisters and said brother of John Toop is as set forth in the fourth Paragraph of Plaintiffs' petition.

8. That subsequent to the death of said Sarah J. Toop, widow of said John Toop, and during the months of January and February, 1909 one Frank Palmer obtained deeds of conveyance from all of the children of one sister of John Toop, towit Mary Ann Plowman, for the sum of Five Thousand ($5,000.00) Dollars, conveying their interest in said real estate as heirs at law of John Toop, deceased, and said Frank Palmer immediately took possession of said premises. That prior to the bringing of this action and on August 30, 1909 said Frank Palmer made a warranty deed of said real estate, a copy of which is hereto attached, marked Exhibit A and made a part hereof, to the defendant Ulysses Land Company, and that said Land Company then took possession of said premises and still retains the possession thereof.

9. That the real estate involved in this action is of the value of more than Three Thousand ($3,000.00) Dollars.

10. That the value of the use and occupancy of said prem-
22 ises from February 1909 to the present time, above the taxes and improvements, is the sum of One Dollar.

11. That on January 21, 1910, said Ulysses Land Company executed a mortgage on said real estate to the defendant, The Northwestern Mutual Life Insurance Company, in the sum of Six Thousand ($6,000.00) Dollars, and the same is wholly unpaid.

12. It is further agreed that Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, named in the fourth paragraph of the petition, were each residents and citizens of the United States at the time of the death of the said John Toop, and that Sarah J. Dyer and Emma Tremlin were the children and only surviving children of Mary Ann Plowman, deceased, who was a sister of the said John Toop, deceased, and that William I. Toop, Jesse Toop and Florence Behrend were each grandchildren of the said Mary Ann Plowman, deceased, and that they were likewise citizens and residents of the United States at the time of the death of the said John Toop; but that none of said children or grandchildren resided in the State of Nebraska at the time of the death of John Toop, or since his death.

Signed this 18th day of April, 1913.

CRANE & BOUCHER &
BULKLEY, GRAY & MORE,
Attorneys for Plaintiffs.
JOHN M. STEWART &
R. S. NORVAL,
Attorneys for Ulysses Land Company Defendant.

F. M. HALL,
Attorneys for Northwestern Mutual Life Insurance Company Defendant.

EXHIBIT A.

Warranty Deed.

Know all men by these presents: That I, Frank Palmer and Lillian W. Palmer his wife, of the County of Butler and State of Nebraska, for and in consideration of the sum of Twelve
23 Thousand Dollars, in hand paid, do hereby grant bargain, sell, convey and confirm unto Ulysses Land Company of the County of Butler and State of Nebraska the following described real estate situated in Butler County and State of Nebraska, towit:

The North Half of the Northeast quarter of Section Thirty-six (36) Township Thirteen (13) North, Range One (1) East 6th P. M.

And South half of southwest quarter of Section Thirty (30) Township Thirteen (13) North Range Two (2) East 6th P. M. all in Butler County, Nebraska.

And I do hereby covenant with the said Ulysses Land Company and its heirs and assigns that I am lawfully seized of said premises; that they are free from encumbrance, that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Lillian W. Palmer hereby relinquishes all right of dower in and to the above described premises.

Signed this 30th day of August A. D. 1909.

FRANK PALMER.
LILLIAN W. PALMER.

In the presence of
J. A. DOBSON.

THE STATE OF NEBRASKA,
Butler County, ss:

On this 30th day of August 1909 before me, George Dobson a Notary Public, duly appointed and qualified for and residing in said county personally came Frank Palmer and Lillian W. Palmer his wife, to me known to be the identical persons described in and who executed the foregoing conveyance as grantors and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and seal the day and year last above written.

[SEAL.] GEORGE DOBSON,
Notary Public.

24 Endorsed: Warranty deed from Frank Palmer, Wf. to Ulysses Land Comp. N. ½ N. E. ¼ 36-13-1 S. ½ S. W. ¼ 30-13-2. Sep. 80/09.

THE STATE OF NEBRASKA,
Butler County, ss:

Entered in numerical index and filed for record in the Clerk's office of said County the 8th day of October 1909, at 9 o'clock and — minutes A. M. and recorded in Book 52 of Deeds at page 681.

M. J. HOLLAND,
County Clerk,
—— ——, *Deputy.*

* * * * * * *

25 *Reply to Answer of Ulysses Land Company.*

Filed April 24, 1913.

Comes now the plaintiffs above named and for reply to the Answer of the defendant, Ulysses Land Company, deny each and every allegations therein contained, save as alleged in plaintiffs' petition or hereinafter admitted.

1. Plaintiffs admit the allegations of the first paragraph of said Answer.

2. Plaintiffs admit the allegations of the second paragraph of said answer.

3. Plaintiffs admit the allegations of the third paragraph of said answer.

4. Plaintiffs admit the allegations of the fourth paragraph of said answer to the effect that none of the lands involved in this action at the time of the death of said John Toop, or at any subsequent time lay or were situated within the corporate limits
26 of any city or two of the State of Nebraska.

5. Plaintiffs admit the allegations of the fifth paragraph of said answer.

6. For further reply to said answer plaintiffs allege that the Statutes of Nebraska referred to by said defendant in its answer as prohibiting plaintiffs from taking the real estate described in plaintiffs' petition by the Laws of descent of Nebraska entitled "An Act restricting non-resident aliens and corporations not incorporated under the laws of Nebraska in their right to acquire and hold real estate and to repeal Sections fifty-four (54) sixty-three (63) and sixty-four (64) of Chapter seventy-three (73) of the compiled Statutes of 1887 and all acts and parts of acts in conflict with this act," approved March 16, 1889 and the acts it purports to repeal, violate the provisions of Section 11, Article 3, and Section 15, Article 3, and Section 25, Article 1, of the Constitution of Nebraska and Section 2, Article 6 of, and the 14th Amendment to the Constitution of the United States.

Wherefore plaintiffs renew their prayer for judgment as contained in their petition.

BULKLEY, GRAY & MORE,
CRANE & BOUCHER,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
State of Nebraska, County of Douglas, ss:

J. J. Boucher being first duly sworn says that he is Attorney and Agent for the plaintiffs above named; that the plaintiffs and each of them are non-residents of and absent from the State of Nebraska and this verification is made by him for this reason; that he knows the contents of the foregoing Reply and that the allegations therein contained are true as he verily believes.

27 J. J. BOUCHER.

Subscribed in my presence and sworn to before me this 19th day of April, 1913.

[NOTARIAL SEAL.] F. A. MULFINGER,
Notary Public.

Reply to Answer of Northwestern Mutual Life Ins. Co.

Filed April 24, 1913.

Come now the plaintiffs above named and for reply to the Answer of the defendant, the Northwestern Mutual Life Insurance Company den*ies* each and every the allegations therein contained save as alleged in plaintiffs' petition or hereinafter admitted.

1. Plaintiffs admit the allegations of the second paragraph of said answer.

2. Plaintiffs admit that the defendant Ulysses Land Company executed the mortgage to the defendant Northwestern Mutual Life Insurance Company, as alleged in Paragraph four of said answer.

3. For further reply to said answer plaintiffs allege that the Statutes of Nebraska referred to by said defendant in its answer as prohibiting plaintiffs from taking the real estate described in plaintiffs' petition by the Laws of descent of Nebraska entitled "An Act restricting non-resident aliens and corporations not incorporated under the laws of Nebraska in their right to acquire and hold real estate and to repeal Sections fifty-four (54) Sixty-three (63) and Sixty-four (64) of Chapter seventy-three (73) of the compiled Statutes of 1887 and all acts and parts of acts in conflict with this act," approved March 16, 1889 and the acts it purports to repeal, violate the provisions of Section 11 Article 3, and Section 15, Article 3, and Section 25 Article 1 of the Constitution of Nebraska and Sec-
28 tion 2, Article 6 of, and the 14th amendment to the Constitution of the United States.

Wherefore plaintiffs renew their prayer for judgment as contained in their petition.

BULKLEY, GRAY & MORE,
CRANE & BOUCHER,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
State of Nebraska, County of Douglas, ss:

J. J. Boucher being first duly sworn says that he is Attorney and Agent for the plaintiffs above named; that the plaintiffs and each of them are non residents of and absent from the State of Nebraska and this verification is made by him for this reason; that he knows the contents of the foregoing Reply and that the allegations therein contained are true as he verily believes.

J. J. BOUCHER.

Subscribed in my presence and sworn to before me this 19th day of April, 1913.

[NOTARIAL SEAL.] F. A. MULFINGER,
Notary Public.

Journal Entry, Judgment.

Entered June 17, 1913.

This cause having heretofore been submitted to the Court, it is by the court considered, ordered and adjudged, that defendants Ulysses Land Company, Northwestern Mutual Life Insurance Company and William Gaskill, go hence without day and recover of the plaintiffs their costs herein expended, taxed at $—. To which ruling of the Court, plaintiffs severally except.

29 *Memorandum Opinion.*

Filed June 18, 1913.

THOMAS C. MUNGER, *D. J.:*

The question presented in this case is whether, under the laws of Nebraska, the lands (not within the corporate limits of a city or town) of a citizen who died intestate, July, 1898 descended to non-resident aliens, subjects of the Kingdom of Great Britain, who would have been heirs but for such alienage. It is unnecessary to consider the provisions of the treaty between the United States and Great Britain, because it was not ratified until the year following the death of the intestate, and had no retroactive effect. At the time of intestate's death, a statute of Nebraska provided as follows:

"Non-resident aliens and corporations not incorporated under the laws of the state of Nebraska, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state,

such lands shall revert and escheat to the state of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated, to enforce forfeitures of all such lands as provided by this act." (Sec. 70, Ch. 73, Comp. Stats.)

It is contended that this statute should be construed so that it would read as if the words "or citizens" were inserted in the exception, making the excepting clause to read, "Except that the widows and heirs of aliens or citizens who have heretofore acquired lands in this state," etc. The Statute as it exists is not open to such an interpolation. In Wunderle v. Wunderle 144 Ill. 40, 33 N. E. 195, an almost identical statute was under consideration. The Court said:

"It is urged that the act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1 to the alien heirs of citizens, as well as to the heirs of aliens; in other words, we are asked to so con-true the exception as to give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale, or acquire an actual residence in the state. This would involve the insertion of the words 'and the alien heirs of citizens' after the words 'except that the heirs of aliens.' By such a construction we would make the legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity."

"But here the legislature has expressly declared that the heirs of certain aliens shall take and hold land for limited periods subject to the privilege of avoiding their escheat to the state by a sale of them, or by acquiring an actual residence in the state, within said periods. But the act of 1887 nowhere declares, nor is there anything on its face to indicate, that the legislature intended thereby to declare that the non-resident alien kindred of citizens should so take and hold lands for certain periods."

It is claimed that this construction of the statute makes it in violation of Sec. XXV of Art. I of the Constitution of Nebraska, which reads as follows:

"No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property."

This contention is based upon the premise that this statute so construed, grants to an alien (whether resident or non-resident) the rights to have his title to lands, theretofore acquired, to descend or to be devised, to either resident or non-resident aliens, while citizens' lands can only be so transmitted to resident aliens. This is a misconception of the statute. There is no prohibition of the right of resident aliens to acquire lands mentioned in this statute, but there is a grant of the right of acquisition to non-resident aliens from aliens. In other words, there is a prohibition directed against non-resident aliens with an exception in favor of non-resident heirs or devisees of aliens then owning lands. A resident alien may acquire title to property in Nebraska by inheritance or devise from a citizen because there is no statute denying such right. A resident alien may

also acquire title to such property by inheritance or devise from aliens who owned the same before the passage of this act, because there is no statute denying such right. The statute in question, in its beginning words, is plainly leveled only against non-
31–36 resident aliens. Hence the exception, being something carved out of the grant, only applies to non-resident aliens. This is demonstrated by the following provision, which refers to the right of such non-resident heirs or devisees to become residents of the state and thereby to continue to hold such lands, a provision that is needless, if the statute refers to resident aliens. As thus construed, the statute makes no discrimination between the rights of resident aliens and of citizens to the possession, enjoyment, or descent of property, and the resident alien may either acquire or transmit title to lands on the same terms as a citizen. As the plaintiffs are non-resident alien heirs of a citizen, the statute forbade their inheritance of the lands in controversy, and judgment will be entered for the defendants.

* * * * * * *

37 *Bond.*

Filed October 9, 1913.

Know all men by these presents, That we, William Toop, Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard and Robert Orchard, as principals, plaintiffs in error, and Chicago Bonding and Surety Company, as surety, are held and firmly bound unto the Ulysses Land Company, a corporation, The Northwestern Mutual Life Insurance Company and William Gaskill, defendants in error, in the sum of One thousand ($1,000.00) Dollars, to be paid to said obligees, their successors, representatives, administrators or assigns, to the payment of which, well and truly made, we bind ourselves, our heirs executors and administrators, jointly and severally by these presents.

Sealed with our seal- and dated this third day of October A. D. 1913.

Whereas, the above bound plaintiffs in error have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the District Court of the United States for the District of Nebraska, Lincoln Division;

Now therefore the condition of the above obligation is such that if the above named plaintiffs in error shall prosecute the above writ of error and answer all costs and damages, if they shall fail to make

good their plea, then this obligation shall remain in full force and effect.

WILLIAM TOOP,
JOHN TOOP,
EMMA MUSSELWHITE,
HENRY EDWARD MUSSELWHITE,
JOHN MUSSELWHITE,
ALICE BERTHA MUSSELWHITE,
ARTHUR MUSSELWHITE,
SIDNEY HERBERT MUSSELWHITE,
MARY ELIZA ORCHARD,
HARRIET KATE ORCHARD,
ALICE ROSIANNA ORCHARD,
ROBERT ORCHARD,
By BULKLEY, GRAY & MORE,
Their Attorneys.
CHICAGO BONDING & SURETY COMPANY,
By L. C. LEVENSON, *President.*

Attest:
O. F. ROBERTS, *Secretary.*

Approved Oct. 9, 1913.
THOS. C. MUNGER, *Judge.*

38 *Order Allowing Writ of Error.*

Filed October 2, 1913.

Let a Writ of Error issue, as prayed, on the execution and delivery to the clerk of this court of an approved bond in the sum of $1,000.00.

Dated at Lincoln, Nebraska, this 2nd day of October A. D. 1913.
THOS. C. MUNGER, *Judge.*

39 *Agreed Stipulation of Facts.*

Filed October 3, 1913.

It is hereby stipulated and agreed by and between the parties hereto, and their respective counsel that at the trial of the above entitled action the following facts were produced in evidence before the Court to wit: an agreed statement of facts signed by the respective counsel and attached thereto, a copy of a deed marked Exhibit "A" as described in said statement of facts, all in the words and figures following, to-wit:

"It is agreed that this case shall be disposed of and judgment entered by the Court without a jury, upon the following facts, together with such additional facts as are contained in the pleadings of either of the parties, and admitted by the opposing parties, and such facts as may be proved at the trial;

1. That John Toop was born about the year 1826 in England, of English parentage, and became a naturalized citizen of the United States in about 1868 in the State of Illinois.

2. That he purchased the land involved in this action March 9, 1889 and continued to own the same until July 28, 1898, the date of his death. That said real estate was not situate within the limits of or within any incorporated city or village.

3. That the said John Toop died at Ulysses, Nebraska, intestate; that is to say, without leaving any last will and testament, and that he was a resident and citizen of the State of Nebraska at the time of his death.

4. That Sarah J. Toop, his widow, had the use and possession of said land after the death of John Toop until November 9, 1907 the date of her death.

5. That John Toop left surviving him neither father, mother children, brothers or sisters.

6. That all of the brothers and sisters of John Toop, to wit: Mary Ann Plowman, William Toop and Betsy Orchard, as set forth in plaintiffs' petition, died prior to his death.

7. That the relationship of the parties to this action to said sisters and said brother of John Toop, is as set forth in the Fourth Paragraph of Plaintiffs' petition.

8. That subsequent to the death of said Sarah J. Toop, widow of said John Toop, and during the months of January, and February, 1909 one Frank Palmer obtained deeds of conveyance from all of the children of one sister of John Toop, to-wit Mary Ann Plowman, for the sum of Five Thousand ($5,000.00) Dollars, conveying their interest in said real estate as heirs at law of John Toop, deceased, and said Frank Palmer immediately took possession of said premises. That prior to the bringing of this action and on August 30, 1909, said Frank Palmer made a warranty deed of said real estate, a copy of which is hereto attached, marked Exhibit A and made a part hereof, to the defendant Ulysses Land Company and that said Land Company then took possession of said premises and still retains the possession thereof.

9. That the real estate involved in this action is of the value of more than Three Thousand ($3,000.00) Dollars.

10. That the value of the use and occupancy of said premises from February 1909 to the present time, above the taxes and improvements, is the sum of One Dollar.

11. That on January 21, 1910 said Ulysses Land Company executed a mortgage on said real estate to the defendant, The Northwestern Mutual Life Insurance Company, in the sum of Six Thousand ($6,000.00) Dollars, and the same is wholly unpaid.

12. It is further agreed that Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, named in the fourth paragraph of the petition, were each residents and citizens of the United States at the time of the death of the said John Toop, and that Sarah J. Dyer and Emma Tremlin were the children and only surviving children of Mary Ann Plowman, deceased, who was a sister of the said John Toop, deceased, and that William I. Toop,

Jesse Toop and Florence Behrend were each grand-children of the said Mary Ann Plowman, deceased, and that they were likewise citizens and residents of the United States at the time of the death of the said John Toop; but that none of said children or grand-children resided in the State of Nebraska at the time of the death of John Toop, or since his death.

Signed this 18th day of April, 1913.

CRANE & BOUCHER &
BULKLEY, GRAY & MORE,
Attorneys for Plaintiff.
JOHN M. STEWART,
R. S. NORVAL,
Attorneys for Ulysses Land Company Defendant.
F. M. HALL,
Attorney for Northwestern Mutual
Life Ins. Company Defendants.

EXHIBIT "A."

Warranty Deed.

Know all men by these presents: That I, Frank Palmer and Lillian W. Palmer, his wife, of the County of Butler and State of Nebraska, for and in consideration of the sum of Twelve Thousand Dollars, in hand paid, do hereby grant, bargain, sell, convey and confirm unto Ulysses Land Company of the County of Butler and State of Nebraska the following described real estate situated in Butler County and State of Nebraska, to-wit:

The North half of the Northeast quarter of Section Thirty-six (36) Township Thirteen (13) North, Range One (1) East 6th P. M. And South half of southwest quarter of Section 41 Thirty (30) Township Thirteen (13) North, Range Two (2) East 6th P. M. all in Butler County, Nebraska.

And I do hereby covenant with the said Ulysses Land Company and its heirs and assigns that I am lawfully seized of said premises; that they are free from encumbrance, that I have good right and lawful authority to sell the same; and I do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever.

And the said Lillian W. Palmer hereby relinquishes all right of dower in and to the above described premises.

Signed this 30th day of August A. D. 1909.

FRANK PALMER.
LILLIAN W. PALMER.

In the presence of
J. A. DOBSON.

THE STATE OF NEBRASKA,
Butler County, ss:

On this 30th day of August 1909 before me George Dobson, a Notary Public, duly appointed and qualified for and residing in

said county personally came Frank Palmer and Lillian W. Palmer his wife, to me known to be the identical persons described in and who executed the foregoing conveyance as grantors and acknowledged the said instrument to be their voluntary act and deed.

Witness my hand and seal the day and year last above written.

[SEAL.] GEORGE DOBSON,
Notary Public."

and that no other or further testimony or evidence was adduced or offered by the plaintiffs and defendants on the trial of said case; and judgment was rendered in said action upon said agreed statement of facts, together with the allegations of the pleadings.

Witness our hands this second day of October, 1913.

BULKLEY, GRAY & MORE,
CRANE & BOUCHER,
Attorneys for Plaintiffs.
JOHN M. STEWART &
R. S. NORVAL,
Attorneys for Defendants Ulysses Land Company.
HALL & BISHOP,
Attorneys for Defendants Northwestern Mutual Life Ins. Company.

42–44 In the United States District Court, District of Nebraska, Lincoln Division.

WILLIAM TOOP et al., Plaintiffs,
v.
ULYSSES LAND COMPANY et al., Defendants.

Order.

I, Thomas C. Munger, Judge of the United States Court, District of Nebraska, do hereby certify that the foregoing stipulation of facts and copy of deed was all of the testimony and evidence produced or offered by the plaintiffs and defendants on the trial of said cause and that no objection to the admission of testimony or evidence was made and that said cause was submitted upon such evidence together with the alegations of the pleadings and I hereby order that such bill of exceptions be made a part of the record in said cause in this Court.

THOS. C. MUNGER,
United States District Judge.

Dated: Lincoln, Nebraska, this third day of October, 1913.

* * * * * * *

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Ulysses Land Company, The Northwestern Mutual Life Insurance Company, and William Gaskill, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the State of Nebraska, at Lincoln, Nebraska, wherein William Toop, John Toop, Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard and Robert Orchard are plaintiffs in error, and the Ulysses Land Company, The Northwestern Mutual Life Insurance Company and William Gaskill are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas C. Munger, Judge of the District Court in and for the District of Nebraska, this ninth day of October, A. D. 1913.

THOS. C. MUNGER, *Judge.*

Attest:

R. C. HOYT,
Clerk of the United States District Court,
District of Nebraska.
By J. H. McCLAY, *Deputy.*

Service of the foregoing Citation and receipt of a copy thereof is admitted this 9th day of October, 1913.

R. S. NORVAL &
JOHN M. STEWART,
Attorney- for Defendant Ulysses Land Company.
HALL & BISHOP,
Attorney- for Defendant Northwestern
Mutual Life Insurance Company.

Form 60.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 13th day of October, 1913, I received this Citation, and on the 14th day of October, 1913 I served the same upon the within-named William Gaskell, at three and one-half miles southwest of Ulysses, in Butler County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

WM. P. WARNER,
United States Marshal for the District of Nebraska,
By CLAUDE P. HENSEL,
Deputy United States Marshal.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the United States District Court, District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court, District of Nebraska, Lincoln Division, before you, at the May Term, 1913, thereof, between William Toop, John Toop, Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard and Robert Orchard, plaintiffs and Ulysses Land Company, a Corporation, The Northwestern Mutual Life Insurance Company, and William Gaskill, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, William Toop, John Toop, Emma Musselwhite, Henry Edward Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard and Robert Orchard, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, District of Columbia, and filed in the office of the Clerk of the United States Supreme Court, City of Washington, on or before the Eighth day of November, 1913, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct
47 that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this Ninth day of October, in the year of our Lord one thousand nine hundred and thirteen.

Issued at the Clerk's office in the city of Lincoln, with the seal of the United States District Court, District of Nebraska, and dated as aforesaid.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,
Clerk of the United States District Court, District of Nebraska,
By J. H. McCLAY, *Deputy.*

Allowed by
Honorable THOS. C. MUNGER, *Judge.*

October 9, 1913.

48 UNITED STATES OF AMERICA,
District of Nebraska, Lincoln Division, ss:

I, R. C. Hoyt, Clerk of the United States District Court, District of Nebraska, hereby certify that pursuant to the foregoing writ of error and in obedience thereto and in compliance with the præcipe, a true copy of which may be found at pages 43 and 44 hereof, the foregoing record,—consisting of 48 pages numbered consecutively from 1 to 48 inclusive,—has been made, and that the same is a true and faithful transcript of the pleadings and other proceedings of record and on file in said court, as the same are mentioned in said præcipe and indicated in the index found at page 2 hereof in the case of William Toop et al. versus The Ulysses Land Company et al., No. 26 Law Docket, and that duly certified copies of the Citation and Writ of error with all endorsements thereon have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court, at Lincoln, in said district, this 18th day of October, A. D. 1913.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT, *Clerk*,
By J. H. McCLAY, *Deputy*.

49 UNITED STATES OF AMERICA:

In the Supreme Court.

WILLIAM TOOP, JOHN TOOP, EMMA MUSSELWHITE, HENRY EDWARD Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard, and Robert Orchard, Plaintiffs in Error,

vs.

ULYSSES LAND COMPANY, a Corporation; THE NORTHWESTERN Mutual Life Insurance Company, and William Gaskill, Defendants in Error.

To the Honorable Clerk of the said Court and to the above named Defendants in Error.

SIRS: Please take notice that the Plaintiffs in Error intend to rely on the following errors claimed by them to have been committed upon trial of this action, as follows:

1. That the said District Court erred in entering judgment upon the pleadings and agreed statement of facts, filed in this cause, in favor of the defendants and against the plaintiffs and holding that the plaintiffs were barred from the right of recovery by reason of Sections 70 and 73 of Chapter 73 (being Sections 4825 and 4828 of the Nebraska Compiled Statutes for the year 1907); when it should have found and held that Sections 70 and 73 of Chapter 73, above mentioned, as well as the entire Act, of which said sections are a part, which said Act is commonly known as Chapter 58 of the laws of

Nebraska for the year 1889, and is entitled, "An Act restraining non-resident aliens and corporations, not incorporated under the laws of Nebraska, in their right to acquire and hold real estate; and to repeal Sections 54, 63 and 64 of Chapter 73 of the Com-
50 piled Statutes of 1887, and all Acts, and parts of Acts, in conflict with this Act"; which was approved, March 26, 1889; and also the Acts of the Legislature of Nebraska, which said Act, known as Chapter 58 of the laws of 1889, purports to repeal, being chapters 62 and 65 of the Legislative Acts of Nebraska for 1887; both approved, March 31, 1887; violate Section 2, Article 6, of the Constitution of the United States, which provides that, "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

2. That the said District Court erred in entering judgment, upon the pleadings and agreed statement of facts filed in this cause, in favor of the defendants and against the plaintiffs, and holding that the plaintiffs were barred from the right of recovery by reason of Sections 70 and 73 of Chapter 73 (being Sections 4825 and 4828 of the Nebraska Compiled Statutes for the year 1907); when it should have found and held that Sections 70 and 73 of Chapter 73, above mentioned, as well as the entire Act, of which said sections are a part, which said Act is commonly known as Chapter 58 of the laws of Nebraska for the year 1899 and is entitled, "An Act restraining non-resident aliens and corporations, not incorporated under the laws of Nebraska, in their right to acquire and hold real estate; and to repeal Sections 54, 63 and 64 of Chapter 73 of the Compiled Statutes of 1887, and all Acts, and parts of Acts, in conflict with this Act;" which was approved March 26, 1889; and also the Acts of the Legislature of Nebraska which said Act, known as Chapter 58 of the Laws of 1889, purports to repeal, being chapters 62 and 65 of the Legislative Acts of 1887 of the State of Nebraska; both approved March 31, 1887; violate the Fourteenth Amendment to the Constitution of the United States, which provides, among other things, that, "No
51 State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. That the said District Court erred in not entering judgment for the plaintiffs and finding that the complainants were entitled to recover said property by virtue of the treaty made and existing between the United States of America and the Kingdom of Great Britain and Ireland, ratified by the Queen, June 18, 1900, and by the President, July 16, 1900; ratifications exchanged, July 28, 1900, and proclaimed, August 6, 1900.

4. That the said District Court erred in not giving proper application to the treaty existing between the United States of America

and the Kingdom of Great Britain, ratified by the President, July 16, 1900, ratifications exchanged, July 28, 1900 and proclaimed, August 6, 1900.

5. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs, upon the pleadings and agreed statement of facts filed in said cause, and that the plaintiffs were barred from the right of recovery by reason of Sections 70 and 73 of Chapter 73 of Nebraska Compiled Statutes for the year 1907 (being Sections 4825 and 4828); when said court should have found and held that the plaintiffs were entitled to recover, and that said Sections 70 and 73 of Chapter 73, above mentioned, as well as the entire Act, of which said Sections are a part, which is commonly known as Chapter 58 of the Legislative Act of the General Assembly of Nebraska; approved, March 16, 1889; also the Acts which said Chapter 58 repeal; violate Section 11, Article 3, of the Constitution of the State of Nebraska, which provides, among other things, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title."

52 6. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs, upon the pleadings and agreed statement of facts filed in said cause, and that the plaintiffs were barred from the right of recovery by reason of Sections 70 and 73 of Chapter 73 of Nebraska Compiled Statutes for the year 1907 (being Sections 4825 and 4828); when said court should have found and held that the plaintiffs were entitled to recover, and that said Sections 70 and 73 of Chapter 73, as above mentioned, as well as the entire act of which said Sections are a part, which is commonly known as Chapter 58 of the Legislative Acts of the General Assembly of Nebraska, approved, March 16, 1889; also the Acts which said Chapter 58 repeal; violate Section 15, Article 3 of the Constitution of the State of Nebraska, wherein it is provided, among other things, that the Legislature shall not pass local or special laws in any of the following cases, "that is to say, changing the law of descent."

7. That the said District Court erred in entering judgment in favor of the Defendants and against the plaintiffs, upon the pleadings and agreed statement of facts filed in said cause, and that the plaintiffs were barred from the right of recovery by reason of Sections 70 and 73 of Chapter 73 of Nebraska Compiled Statutes for the year 1907 (being Sections 4828 and 4828); when said Court should have found and held that the plaintiffs were entitled to recover, and that said Sections 70 and 73 of Chapter 73, above mentioned, as well as the entire Act of which said Sections are a part, which is commonly known as Chapter 58 of the Legislative Acts of the General Assembly of Nebraska; approved, March 16, 1889; also the Acts which said Chapter 58 repeal; violate Section 25, Article 1, of the Constitution of the State of Nebraska, which provides that: "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

53 8. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs upon the pleadings and agreed statement of facts filed in said cause, because the laws of the State of Nebraska (being Chapter 58 of the Legislative Acts of 1889 and Chapters 62 and 65 of the laws of 1887); violate the Constitution of the United States, and particularly Section 2, Article 6; also the Fourteenth Amendment of the Constitution of the United States; also said laws are in conflict with the treaty between the United States and Great Britain, proclaimed, August 6, 1900.

9. That the said District Court erred in not giving proper application to the treaty between the United States and Great Britain and Ireland, proclaimed, August 6, 1900.

You are hereby further notified that the Plaintiffs in Error, think it necessary and request that the following parts of the Record be printed for use of the Supreme Court, to-wit:

1. The Complaint and Amendments.
2. The Demurrer of the Defendants.
3. The Opinion of the Court on said Demurrer.
4. The order over-ruling said Demurrer.
5. Answers of all the Defendants.
6. The Replication to the Answers.
7. Bill of Exceptions or Stipulation of Facts.
8. Opinion of the Trial Court.
9. Judgment of the Trial Court.
10. The Writ of Error.
11. Citation for the admission of service and return of service thereunder.
12. Undertaking or Bond.
13. Statement of Errors relied upon as above set forth.

ALMON W. BULKLEY,
C. E. MORE,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiffs in Error.

Received copy of above notice this 15th day of November, 1913.

F. W. HALL &
FRANK E. BISHOP,
Att'y- for Northwestern Mutual Life Ins. Co.
JOHN M. STEWART,
T. F. WILLIAMS,
J. A. BROWN,
Att'ys for Ulysses Land Company.

54 UNITED STATES OF AMERICA:

In the Supreme Court.

WILLIAM TOOP, JOHN TOOP, EMMA MUSSELWHITE, HENRY EDWARD Musselwhite, John Musselwhite, Alice Bertha Musselwhite, Arthur Musselwhite, Sidney Herbert Musselwhite, Mary Eliza Orchard, Harriet Kate Orchard, Alice Rosianna Orchard, and Robert Orchard, Plaintiffs in Error,

vs.

ULYSSES LAND COMPANY, a Corporation; THE NORTHWESTERN Mutual Life Insurance Company, and William Gaskill, Defendants in Error.

Affidavit.

STATE OF NEBRASKA,
County of Douglas, ss:

Thomas D. Crane being first duly sworn on his oath states that he is a member of the firm of Crane and Boucher and that he is one of the Attorneys for the above named plaintiffs.

Affiant further states that on the 18th day of November, 1913, he sent in the name of affiant's said firm, a true copy of the "Notice of Statement of Errors relied upon and Portions of Record to be printed" to which this affidavit is attached to the above named defendant, William Gaskill, by Registered Mail from Omaha, Nebraska, in an envelope duly stamped and properly addressed to the said defendant William Gaskill at Ulysses, Nebraska, and that he received from the Postmaster at Omaha, the receipt for said Registered Letter which is hereto attached and marked "Exhibit A" and made a part of this affidavit.

Affiant further states that in return he received on this 20th day of November 1913, through the Post Office at Ulysses, Nebraska, the Return Registry Receipt signed by said defendant William Gaskill, which is hereto attached and marked "Exhibit B" and made a part of this affidavit.

THOMAS D. CRANE.

("EXHIBIT A.")

16377.

P. O., OMAHA, NEBR., Nov. 18, 1913.

Letter / [Parcel]* } No. —.

Nov. 17, 1913

Received for registration Nov. 18, 1913, *191–*, from Crane and Boucher, Omaha Nat'l Bk. Bldg., addressed to William Gaskill, Ulysses, Nebr.

1 class postage prepaid.

POSTMASTER,
Per C.

[*Word enclosed in brackets erased in copy.]

[On margin:] U. S. Registered Mails go to every post office in the world.

Letters and parcels may be registered at any post office or at any post-office station, and by rural carriers throughout their routes. Letters will be registered by letter carriers in the residential districts of cities.

†735/N. R.

"EXHIBIT B."

Form 1548.

Registry Return Receipt.

Received from the postmaster registered article, the original number of which appears on the reverse side of this card.

Date of delivery —— —, 191–.

(To be filled in by person signing receipt.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

William Gaskill.

(Signature or name of addressee.)

—— ——.

(Signature or name of addressee's agent.)

Registered matter, the delivery of which has not been restricted by the sender or the addressee, is deliverable to any responsible person who customarily receives the ordinary mail of the addressee. (See amended sec. 858, P. L. and R.)

When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

Post Office Department
Official Business.

Penalty for Private use to Avoid Payment of Postage, $300.

Original Reg. No. 16377.

Postmark of Delivery Office
Ulysses
Nov. 19.
7 PM
1913
Nebr.
and Date of Delivery.

Return to:

Crane & Boucher,
(Name of sender.)

Street and Number, or
Post Office Box,

Om. Nat'l Bk. Bldg.,
Omaha, Nebraska.

The postmaster who delivers the registered article must see that this card is properly signed, legibly postmarked, and mailed to the sender, without envelope or postage.

[† In pencil in copy.]

Subscribed in my presence and sworn to before me this 21st day of November 1913.

[Notarial Seal Frank C. Yates, Douglas County, Nebraska.]

FRANK C. YATES,
Notary Public.

Commission expires Sep. 18, 1917.

[Endorsed:] 763/23914. In the Supreme Court of the United States. No. 763. William Toop et al., Plaintiffs in Error, vs. Ulysses Land Company, a Corporation et al., Defendants in Error. Notice of statement of errors relied upon and portions of Record to be printed. Bulkley, Gray & More, 518 Home Insurance Bldg., Chicago.

[Endorsed:] File No. 23,914. Supreme Court U. S., October term, 1913. Term No. 763. William Toop et al., Pl'ffs in Error, vs. Ulysses Land Company et al. Specification of errors to be relied upon and designation by plaintiffs in error of parts of record to be printed, and proof of service of same. Filed December 10, 1913.

Endorsed on cover: File No. 23,914. Nebraska D. C. U. S. Term No. 284. William Toop, Emma Musselwhite, et al., plaintiffs in error, vs. Ulysses Land Company, The Northwestern Mutual Life Insurance Company, and William Gaskill. Filed October 22d, 1913. File No. 23,914.

2

Office Supreme Court, U. S.
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MAR 2 1915
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 284

WILLIAM TOOP, EMMA MUSSELWHITE et al.,
Plaintiffs in Error.

vs.

ULYSSES LAND COMPANY, THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and WILLIAM GASKILL,
Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska, Lincoln Division.

Brief and Argument for Plaintiffs in Error.

ALMON W. BULKLEY,
CLAIR E. MORE,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiffs in Error.

CHAMPLIN LAW PRINTING CO.

INDEX.

PAGE.

Alien laws of Nebraska of 1856, section 62.... 18
1861, section 35 and 36 chapter 1.... 18
1864 19
1887, chapter 62 .. 21
1887, chapter 65 .. 22
1889, chapter 58 .. 9

Laws of descent of Nebraska, 1855 and 1856.. 23
1861, entitled "Of Real Estate" .. 24
1861, "Of Personal Property" 26

Constitution of Nebraska, Section 14, article 1, 1866. 22
Section 25, article 1, 1875. 21
Section 15, article 3, 1875. 21
Section 13, article 1, 1875. 21

Errors relied on 5

The law in question violates section 2, article 6 of the Constitution of the United States, and the Treaty of Great Britain of 1900..... 28

Alexander *v.* Alexander, 41 N. W. Rep. 1065, 26 Neb. 673 35
Bennett *v.* Bennett, 217 Ill. 234..... 33
Carlow *v.* Aultman, 28 Neb. 672..... 31
Hauenstein *v.* Lynham, 100 U. S. 483..... 31
Runyan *v.* Coster, 14 Peter, 122..... 30

The act violates the 14th amendment of the Constitution 37

Adams *v.* Akerlund. 168 Ill. 632, 180 Mo. 627 57

Behaud *v.* Bize, 105 Fed. Rep. 485..... 57
Blythe *v.* Hinckley, 180 U. S. 333..... 49
Connelly *v.* Union Sewer Pipe Co., 184 U. S. 540 62
Erickson *v.* Carlson, 145 N. W. Rep. 352... 57
Fairfax *v.* Hunter, 7 Cranch, 603..... 47
Gregory *v.* Riggs, 122 U. S. 258..... 55
Jackson *v.* Adams, 7 Wendell N. Y. 368.... 48
Johnson *v.* Eversole Lbr. Co., 57 S. E. Rep. 519, 144 N. C. 717 50
Levy *v.* McCartree, 6 Peter, 102..... 49
Manuel *v.* Wulff, 152 U. S. 505..... 47
Osterman *v.* Baldwin, 73 U. S. 116..... 46
Pembrooke *v.* Huston, 79 S. W. Rep. 470, 180 Mo. 627 45

Treaties:

Argentine, 1853 52
Russia, 1832 53
Bolivia, 1858 54
Brazil, 1828 54
Brunswick & Luxemburg, 1854 54
Columbia, 1846 54
France, 1853 55
Germany, 1871 56
Italy, 1871 56
Sweden, 1783 56
Switzerland, 1850 57

The act violates section 15, article 3 of the Constitution of Nebraska 66
Connelly *v.* Union Sewer Pipe Co., 184 U. S. 540 62

The act violates section 25, article 1 of the Constitution of 1875 62
Dougherty *v.* Kubet, 67 Neb. 269 (distinguished) 69

Glynn *v.* Glynn, 62 Neb. 872 (distinguished) 69
Wunderlee *v.* Wunderlee, 144 Ill. 40 (distinguished) 63
Grantors of complainants have no inheritable right 70
Butschkowski *v.* Brecks, 143 N. W. Rep. 923, 94 Neb. 532 74
Blythe *v.* Hinckley, 180 U. S. 333..... 74
Erickson *v.* Carlson, 145 N. W. 352..... 74
Hamilton *v.* Brown, 161 U. S. 256..... 73
Johnson *v.* Olson, 142 Pac. 256..... 72
Levy *v.* McCartree, 31 U. S. 102..... 70
McCreerys *v.* Summerville, 9 Wheat. 354.. 74
Minors Estate, 76 Pac. 962, 143 Calif. 194.. 73
Taylor *v.* Benham, 5 Howard, 232..... 74
The rule of interpretation if the act is held constitutional, would be to vest in the complainants, their interest in the real estate 75
Lewis Sutherland, Statutory Construction, Vol. 2, sections 363, 370, 347.....75-76
Douglas *v.* Cameron, 47 Neb. 358 (distinguished) 85
Behaud *v.* Bize, 105 Fed. Rep. 485..... 86
The maxim "noscitur a sociis" applies..... 89
Lewis Sutherland on Statutory Construction.. 89
The fair construction of the act, if constitutional 82
That the interests of complainants can only be taken away by office found 100
Carlow *v.* Aultman, 28 Neb. 672..... 100
Bank *v.* Matthews, 98 U. S. 621..... 101
Fairfax *v.* Hunter, 7 Cranch, 603..... 101
Jackson *v.* Adams, 7 Wendell N. Y. 368.... 101
Manuel *v.* Wulff, 152 U. S. 505..... 101
Osterman *v.* Baldwin, 73 U. S. 116..... 101
Pembrooke *v.* Huston, 79 S. W. Rep. 470 101

The widow has absolute enjoyment of the real estate 101
Alexander *v.* Alexander, 26 Neb. 673..... 101
This court has jurisdiction of this appeal..... 102
Loeb *v.* Columbian Tp. Trustees, 179 U. S. 472 102
Holder *v.* Aultman, 169 U. S. 81..... 102
Home Life Ins. Co. *v.* Fisher, 188 U. S. 727 103
Fidelity *v.* Mettler, 185 U. S. 309..... 103
The trial court misconceived the effect of the statute 103
Review of the decisions of the state court..... 103
State *ex rel.* *v.* Stuht, 79 N. W. Rep. 491, 52 Neb. 209 104
Trumbull *v.* Trumbull, 55 N. W. Rep. 869, 37 Neb. 340 105
State *v.* Tibbetts, 71 N. W. Rep. 990, 52 Neb. 228 105
Webster *v.* Sitting, 81 N. W. Rep. 59 Neb. 563 105
State *v.* Farmers M. I. Co., 80 N. W. Rep. 52, 51 Neb. 1..... 105
Connelly *v.* Union Sewer Pipe Co., 184 U. S. 540 106

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

No. 284

WILLIAM TOOP, EMMA MUSSELWHITE et al.,
Plaintiffs in Error.

vs.

ULYSSES LAND COMPANY, THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and WILLIAM GASKILL,
Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska, Lincoln Division.

Brief and Argument for Plaintiffs in Error.

MAY IT PLEASE THE COURT:

This writ of error is brought to review a judgment of the District Court of Nebraska, Lincoln Division. The cause in the District Court was an action of ejectment brought by plaintiffs in error (plaintiffs below) to recover plaintiffs' right to an undivided two-thirds of 160 acres of farm land in Butler county, Nebraska.

The case was tried before the court without a jury and the court found for the defendants and entered judgment accordingly, and it is this judgment that plaintiffs in error claim to be erroneous and should be reversed.

The rights of both plaintiffs and defendants come through one John Toop, who died intestate at Ulysses, Nebraska, in 1898. He left no children or descendants of children, only a widow surviving. Under the law of Nebraska she was entitled to the free use and occupation of the land during her life. She died on November 9, 1907. John Toop left no children or descendants of children, no father, no mother, no brother or sister surviving.

John Toop's father and mother both died in England, as British subjects. John Toop had one brother, namely, William, and two sisters, namely, Mary Ann Plowman and Betsy Orchard, but all had died prior to his death.

It nowhere appears that either his brother or sisters ever became citizens or residents of the United States. They are presumed therefore to have remained citizens of Great Britain.

The plaintiffs are the children and grandchildren of William Toop, the brother, and of Betsy Toop, the sister of John Toop (Rec. 2). The defendants claim their title and right through a conveyance by the children of Mary Ann Plowman, a sister.

It nowhere appears that Mary Ann Plowman ever became a citizen of the United States. She is presumed to have continued her citizenship of England.

The plaintiffs are all citizens and residents of England.

The children of Mary Ann Plowman are all citizens and residents of the United States but none of

them are or ever have been residents of the State of Nebraska (Rec. 19).

The foregoing is to amplify the brief statement of facts on which the cause was tried and which statement of facts was made a part of the record by order of court (see printed record, 18 and 20), and which facts are as follows:

> "It is agreed that this case shall be disposed of and judgment entered by the court without a jury, upon the following facts, together with such additional facts as are contained in the pleadings of either of the parties, and admitted by the opposing parties, and such facts as may be proved at the trial:
>
> 1. That John Toop was born about the year 1826 in England, of English parentage, and became a naturalized citizen of the United States in about 1868 in the State of Illinois.
>
> 2. That he purchased the land involved in this action March 9, 1889, and continued to own the same until July 28, 1898, the date of his death. That said real estate was not situated within the limits of or within any incorporated city or village.
>
> 3. That the said John Toop died at Ulysses, Nebraska, intestate; that is to say, without leaving any last will and testament, and that he was a resident and citizen of the State of Nebraska at the time of his death.
>
> 4. That Sarah J. Toop, his widow, had the use and possession of said land after the death of John Toop until November 9, 1907, the date of her death.
>
> 5. That John Toop left surviving him neither father, mother, children, brothers or sisters.
>
> 6. That all of the brothers and sisters of John Toop, to wit, Mary Ann Plowman, William Toop and Betsy Orchard, as set forth in plaintiffs' petition, died prior to his death.

7. That the relationship of the parties to this action, to said sisters and said brother of John Toop, is as set forth in the fourth paragraph of plaintiffs' petition.

8. That subsequent to the death of said Sarah J. Toop, widow of said John Toop, and during the months of January, and February, 1909, one Frank Palmer obtained deeds of conveyance from all of the children of one sister of John Toop, to wit, Mary Ann Plowman, for the sum of five thousand ($5,000) dollars, conveying their interest in said real estate as heirs at law of John Toop, deceased, and said Frank Palmer immediately took possession of said premises. That prior to the bringing of this action and on August 30, 1909, said Frank Palmer made a warranty deed of said real estate, a copy of which is hereto attached, marked Exhibit A and made a part hereof, to the defendant Ulysses Land Company and that said land company then took possession of said premises and still retains the possession thereof.

9. That the real estate involved in this action is of the value of more than three thousand ($3,000) dollars.

10. That the value of the use and occupancy of said premises from February, 1909, to the present time, above the taxes and improvements, is the sum of one dollar.

11. That on January 21, 1910, said Ulysses Land Company executed a mortgage on said real estate to the defendant, The Northwestern Mutual Life Insurance Company, in the sum of six thousand ($6,000) dollars, and the same is wholly unpaid.

12. It is further agreed that Sarah J. Dyer, Emma Tremlin, William I. Toop, Jesse Toop and Florence Behrend, named in the fourth paragraph of the petition, were each residents and citizens of the United States at the time of the death of the said John Toop, and that

> Sarah J. Dyer and Emma Tremlin were the children and only surviving children of Mary Ann Plowman, deceased, who was a sister of the said John Toop, deceased, and that William I. Toop, Jesse Toop and Florence Behrend were each grandchildren of the said Mary Ann Plowman, deceased, and that they were likewise citizens and residents of the United States at the time of the death of the said John Toop; but that none of said children or grandchildren resided in the State of Nebraska at the time of the death of John Toop, or since his death."

There is attached to said statement of facts a warranty deed from Frank Palmer and wife to the Ulysses Land Company.

The complaint states specifically (see the fifth paragraph of the petition, pages 2 and 3 of the printed record) that Sarah J. Dyer, Emma Tremlin, children of Mary Ann Plowman, and William J. Toop, Jesse Toop and Florence Behrend, grandchildren of Mary Ann Plowman, made a deed of their interest to Palmer subsequent to the death of Sarah Toop, the widow of John Toop, deceased, and that Palmer in turn conveyed the same to the Ulysses Land Company, and the Ulysses Land Company made the mortgage to the Northwestern Mutual Life Insurance Company, and that Gaskill was in possession of the land, claiming to hold the same as a tenant under the Ulysses Land Company. This is admitted (see Ptd. Rec. 8).

The assignment of errors relied upon are as follows:

> 1. That the said District Court erred in entering judgment upon the pleadings and agreed statement of facts, filed in this case, in favor of the defendants and against the plaintiffs and

holding that the plaintiffs were barred from the right of recovery by reason of sections 70 and 73 of chapter 73 (being sections 4825 and 4828 of the Nebraska Compiled Statutes for the year 1907); when it should have found and held that sections 70 and 73 of chapter 73, above mentioned, as well as the entire act, of which said sections are a part, which said act is commonly known as chapter 58 of the laws of Nebraska for the year 1889, and is entitled, "An Act restraining non-resident aliens and corporations, not incorporated under the laws of Nebraska, in their right to acquire and hold real estate; and to repeal sections 54, 63 and 64 of chapter 73 of the Compiled Statutes of 1887, and all acts, and parts of acts, in conflict with this act"; which was approved March 26, 1889; and also the acts of the legislature of Nebraska, which said act, known as chapter 58 of the laws of 1889, purports to repeal, being chapters 62 and 65 of the legislative acts of Nebraska for 1887; both approved, March 31, 1887; violate section 2, article 6, of the Constitution of the United States, which provides that "This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

2. That the said District Court erred in entering judgment, upon the pleadings and agreed statement of facts filed in this cause, in favor of the defendants and against the plaintiffs, and holding that the plaintiffs were barred from the right of recovery by reason of sections 70 and 73 of chapter 73 (being sections 4825 and 4828 of the Nebraska Compiled Statutes for the year 1907); when it should have found and held that sections 70 and 73 of chapter 73, above

mentioned, as well as the entire act, of which said sections are a part, which said act is commonly known as chapter 58 of the laws of Nebraska for the year 1899 and is entitled, "An Act restraining non-resident aliens and corporations, not incorporated under the laws of Nebraska, in their right to acquire and hold real estate; and to repeal sections 54, 63 and 64 of chapter 73 of the Compiled Statutes of 1887, and all acts, and parts of acts, in conflict with this act"; which was approved March 26, 1889; and also the acts of the legislature of Nebraska which said act, known as chapter 58 of the laws of 1889, purports to repeal, being chapters 62 and 65 of the legislative acts of 1887, of the State of Nebraska; both approved March 31, 1887; violate the fourteenth amendment to the Constitution of the United States, which provides, among other things, that "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. That the said District Court erred in not entering judgment for the plaintiffs and finding that the complainants were entitled to recover said property by virtue of the treaty made and existing between the United States of America and the Kingdom of Great Britain and Ireland, ratified by the Queen, June 18, 1900, and by the President, July 16, 1900; ratifications exchanged July 28, 1900, and proclaimed August 6, 1900.

4. That the said District Court erred in not giving proper application to the treaty existing between the United States of America and the Kingdom of Great Britain, ratified by the President, July 16, 1900, ratifications exchanged July 28, 1900, and proclaimed August 6, 1900.

6. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs, upon the pleadings and agreed statement of facts filed in said cause, and that the plaintiffs were barred from the right of recovery by reason of sections 70 and 73 of chapter 73 of Nebraska Compiled Statutes for the year 1907 (being sections 4825 and 4828); when said court should have found and held that the plaintiffs were entitled to recover, and that said sections 70 and 73 of chapter 73, as above mentioned, as well as the entire act of which said sections are a part, which is commonly known as chapter 58 of the legislative acts of the general assembly of Nebraska, approved March 16, 1889; also the acts which said chapter 58 repeal; violate section 15, article 3 of the constitution of the State of Nebraska, wherein it is provided, among other things, that the legislature shall not pass local or special laws in any of the following cases, "that is to say, changing the law of descent."

7. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs, upon the pleadings and agreed statement of facts filed in said cause, and that the plaintiffs were barred from the right of recovery by reason of sections 70 and 73 of chapter 73 of Nebraska Compiled Statutes for the year 1907 (being sections 4825 and 4828); when said court should have found and held that the plaintiffs were entitled to recover, and that said sections 70 and 73 of chapter 73, above mentioned, as well as the entire act of which said sections are a part, which is commonly known as chapter 58 of the legislative acts of the general assembly of Nebraska; approved, March 16, 1889; also the acts which said chapter 58 repeal; violate section 25, article 1, of the constitution of the State of Nebraska, which provides that: "No distinction shall ever be made by law between resident

aliens and citizens in reference to the possession, enjoyment or descent of property."

8. That the said District Court erred in entering judgment in favor of the defendants and against the plaintiffs upon the pleadings and agreed statement of facts filed in said cause, because the laws of the State of Nebraska (being chapter 58 of the legislative acts of 1889 and chapters 62 and 65 of the laws of 1887); violate the Constitution of the United States, and particularly section 2, article 6; also the fourteenth amendment of the Constitution of the United States; also said laws are in conflict with the treaty between the United States and Great Britain, proclaimed August 6, 1900.

9. That the said District Court erred in not giving proper application to the treaty between the United States and Great Britain and Ireland, proclaimed, August 6, 1900.

The law of Nebraska which is drawn into question, known as chapter 58 of the laws of 1889, approved March 16, 1889, is as follows: The references in parentheses following section numbers of the act, refer to the pargraph section as appearing in the Compiled Laws of 1907 of Nebraska.

CHAPTER 58.

"An Act *restricting* non-resident aliens and corporations not incorporated under the laws of Nebraska, in their right to acquire and hold real estate, and to repeal sections fifty-four (54), sixty-three (63) and sixty-four (64) of chapter seventy-three (73) of the Compiled Statutes, 1887, and all acts and parts of acts in conflict with this act.

Be it Enacted by the Legislature of the State of Nebraska:

Section 1. (Section 70, chapter 73, being section 4825, Laws of 1907.) Non-resident aliens and corporations not incorporated under the laws

of the State of Nebraska, are hereby *prohibited* from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten (10) years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the State of Nebraska, and it shall be the duty of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this act.

Section 2. (Section 71, chapter 73, being section 4826 of the Laws of 1907.) Whenever any such lands shall revert and escheat to the State of Nebraska as provided in this act, it shall be the duty of the county attorney of the county in which such lands are situated to proceed against such alien in the District Court of the county where the land is situated, for the purpose of having such forfeiture declared. Service of summons may be had upon the nonresident alien defendants by publication as provided in the statutes of Nebraska for the service of summons by publication in cases of foreclosure of mortgages, and the court shall have power to hear and determine the questions presented in such cases and to declare such lands escheated to the state; and when such forfeiture shall be declared by the District Court it shall be the duty of the clerk of the court to notify the governor of the state that the title to such lands is vested in the state by the decree of the said court, and the clerk of the court shall present the auditor of public accounts with the bill of costs incurred by the county in prosecu-

ting such case, who shall issue a warrant to the clerk of the court on the state treasurer to repay the county for such costs incurred.

The heirs or persons who would have been entitled to such lands, shall be paid by the State of Nebraska the full value thereof, as ascertained by appraisement upon the oaths of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law, and shall be disposed of, as other lands belonging to the state; PROVIDED, That the expense of the appraisement shall be deducted from the appraised value of the land.

Section 3. (Section 72, chapter 73, being section 4827 of the Laws of 1907.) Any non-resident alien who owns land in this state at the time this act takes effect, may dispose of the same during his life to bona fide purchasers for value, and may take security for the purchase money with the same rights as to securities as a citizen of the United States.

Section 4. (Section 73, chapter 73, being section 4828 of the Laws of 1907.) This act shall not, nor shall anything in the statutes of Nebraska, prevent the holders, whether non-resident aliens or corporations not organized under the laws of the State of Nebraska, of liens upon real estate or any interest therein, whether heretofore or hereafter acquired, from holding or taking a valid title to the real estate subject to such liens, nor shall it prevent any such alien or corporation from enforcing any lien or judgment for any debt or liability now existing, or which may hereafter be created, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment; PROVIDED, HOWEVER, That all lands so acquired shall be sold within ten (10) years after the title thereto shall be perfected in such non-resident alien or foreign corporation, and in default of such

sale within such time, such real estate shall revert and escheat to the State of Nebraska, as provided in this act.

PROVIDED, FURTHER, That the provisions of this act shall not apply to the real estate necessary for the construction and operation of railroads, and

PROVIDED, FURTHER, That nothing in this act shall be construed to prohibit any non-resident alien or foreign corporation from purchasing and acquiring title to so much real estate as shall be necessary for the purpose of erecting and maintaining manufacturing establishments, and

PROVIDED, FURTHER, That the provision of this act shall not apply to any real estate lying within the corporate limits of cities and towns.

Section 5. Sections fifty-four (54), sixty-three (63), and sixty-four (64), of chapter seventy-three (73), of the Compiled Statutes of 1887, as now existing, and all acts and parts of acts in conflict with this act are hereby repealed.

Section 6. There being an emergency, this act shall take effect and be in force from and after its passage and approval.

Approved March 16, 1889."

BRIEF OF AUTHORITIES.

The law of Nebraska of March 16, 1889, violates section 2, article 6 of the Constitution of the United States, and the Treaty of Great Britain of 1900.

The non-resident alien takes the title to the real estate in the State of ~~Canada~~ Nebraska, and which cannot be divested except by the state. Any attempts to divest the non-resident alien from taking by inheritance, devise or purchase, violates the above treaty.

Runyan v. *Coster*, 14 Peter, 122.

Carlow v. *Aultman*, 28 Neb. 672.

The treaty protects the rights of non-resident aliens. Notwithstanding, John Toop died in 1898, the property descended to the widow and the heirs do not take anything until her death, she dying in 1907, the treaty of 1900 protects the rights of complainants.

Hauenstein v. *Lynham*, 100 U. S. 483.

The real estate does not vest in the collateral heirs until the widow's death.

Bennett v. *Bennett*, 217 Ill. 234.

The widow cannot be divested during life.

Alexander v. *Alexander*, 26 Neb. 673; 41 N. W. Rep. 1065.

The act in question violates the 14th amendment of the Constitution of the United States, in that it attempts to take property from one and transfer it to another without due process of law.

The constitution of Nebraska provides that its courts shall be open to every person for any injury due him in his lands, etc.

Constitution of Nebraska, 1875, Sec. 13, Art. 1.

The state cannot deprive one of his property by inheritance, or which he takes by devise or purchase under the statutes, like the one in question, without due process of forfeiture in a court of law.

Pembrooke v. *Huston,* 79 S. W. Rep. 470; 180 Mo. 627.
Osterman v. *Baldwin,* 73 U. S. 116.
Manuel v. *Wulff,* 152 U. S. 505.
Fairfax v. *Hunter,* 7 Cranch, 603.
Jackson v. *Adams,* 7 Wendell, N. Y. 368.
Blythe v. *Hinckley,* 180 U. S. 333.
Lessees of Levy v. *McCartee,* 6 Peter, 102.
Johnson v. *Eversole Lbr. Co.,* 57 S. E. Rep. 519; 144 N. C. 717.

Also because it denies persons equal protection of the law, *i. e.,* it discriminates between non-resident aliens.

The Constitution of Nebraska, Sec. 15, Art. 3.

Also the following treaties (see 7 Fed. Statutes annotated):

Argentine, 1853, Art. 9, page 412.
Russia, 1832, Art. 10, page 779.
Bolivia, 1858, Art. 12, page 444.
Brazil, 1828, Art. 11, page 452.
Brunswick & Luxemberg, 1854, Art. 2, page 460.

Columbia, 1846, Art. 12, page 506.
France, 1853, Art. 7, page 552.
Sweden, 1783, Art. 6, page 828.
Italy, 1871, Art. 22, page 659.
Switzerland, Art. 6, page 842.
Gregory v. *Riggs,* 122 U. S. 258.
Behaud v. *Bize,* 105 Fed. Rep. 485.
Adams v. *Akerlund,* 168 Ill. 632.
Erickson v. *Carlson,* 145 N. W. Rep. 352 (Neb.).

Also because it discriminates between non-resident alien heirs of citizens and non-resident alien heirs of aliens (see same authorities).

The law violates section 15, article 3, of the constitution of Nebraska, in that the legislature shall not pass any local or special laws, "changing the law of descent." It is special in two respects.

First, it discriminates between people of the same class.

Second, it discriminates as to the ownership of one class of property.

Conlley v. *Union Sewer Pipe Co.,* 184 U. S. 540.

The law in question violates section 25, article 1, of the Nebraska constitution, in that no distinction shall ever be made between resident aliens and citizens in reference to the possession, enjoyment or descent of property.

Wunderlee v. *Wunderlee,* 144 Ill. 40 (distinguished).
Dougherty v. *Kubet,* 67 Neb. 269 (distinguished).
Glynn v. *Glynn,* 62 Neb. 872 (distinguished).

The grantors of defendants in error acquire no title to the property if the complainants acquire no title, because they have to trace their right through the same non-resident aliens.

Lessees of Levy v. *McCartree,* 31 U. S. 102.

Johnson v. *Olson,* 142 Pac. Rep. 256 (Kansas).

Minors Estate, 76 Pac. 968; 143 Calif. 194.

Hamilton v. *Brown,* 168 U. S. 256.

Blythe v. *Hinckley,* 180 U. S. 333.

McCreery's Lessee v. *Summerville,* 9 Wheat. 354.

Taylor v. *Denham,* 5 Howard, 232.

Butschkowski v. *Brecks,* 143 N. W. 923; 94 Neb. 532.

Erickson v. *Carlson,* 145 N. W. 352 (Neb.).

In giving a proper construction, the intent must be ascertained.

Lewis-Sutherland Statutory Construct., Vol. 2, 363, 370, 347.

Douglas v. *Cameron,* 47 Neb. 358 (distinguished).

The maxim "*noscitur a sociis*" applies.

Lewis-Sutherland Statutory Construction, Vol. 2, Sec. 414.

That complainants' interest can only be taken by proper proceedings by the state.

Carlow v. *Aultman,* 28 Neb. 672; 44 N. W. Rep. 874.

Pembrooke v. *Huston,* 79 S. W. Rep. 470; 180 Mo. 627.

Osterman v. *Baldwin,* 73 U. S. 116.
Manuel v. *Wulff,* 152 U. S. 505.
Fairfax v. *Hunter,* 7 Cranch, 603.
Jackson v. *Adams,* 7 Wendell N. Y. 368.

This court has jurisdiction on this appeal.

Loeb v. *Columbian Tp. Trustees,* 179 U. S. 472.
Holder v. *Aultman,* 169 U. S. 81.
Home Life Insurance Co. v. *Fisher,* 188 U. S. 727.
Fidelity Ins. Co. v. *Mettler,* 185 U. S. 309.

The trial court misconceived the effect of the statute.

The principle of equality runs through all the constitutions, federal and state.

It is a principle frequently announced by this court and the Supreme Court of Nebraska.

State ex rel. v. *Stuht,* 79 N. W. Rep. 941; 52 Neb. 209.
Trumbull v. *Trumbull,* 55 N. W. Rep. 869; 37 Neb. 340.
State v. *Tibbets,* 71 N. W. Rep. 990; 52 Neb. 228.
Webster v. *Sitting,* 81 N. W. Rep. 510; 59 Neb. 563.
State v. *Farmers M. I. Co.,* 80 N. W. Rep. 52; 51 Neb. 1.

History of Laws of Descent and the Alien Laws of Nebraska.

Before discussing the questions involved in this case, it might be well to bring to the attention of the court the history of the laws in reference to aliens holding real estate in the State of Nebraska, as well as the laws of descent and the constitutional provisions.

In 1856 the territorial legislature of Nebraska, being the second session of the legislative assembly, adopted what might be called a code, which was approved on January 26, 1856. Chapter 31 of that code is entitled "Of Real Estate and the Alienation There by Deed," and section 62 of that chapter, page 89, is as follows:

> "Sec. 62. Any alien may acquire and hold real estate or interest therein, by purchase, devise or descent, and he may convey, mortgage or devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such real estate shall be held; conveyed, mortgaged or devised, or shall descend in like manner, and with like effect, as if such alien were a native citizen of the United States."

That act has not been repealed directly.

In 1861 at the seventh legislative assembly of the territory of Nebraska, the legislature passed an act entitled "An Act Providing for the Settlement of the Estate of Decedents and for Other Purposes." It is divided into thirteen chapters, and the chapters are divided into sections or paragraphs. Sections 35 and 36 of chapter I are as follows:

> "Sec. 35. Any alien may acquire and hold lands, or any right thereto, or interest therein

by purchase, devise, or descent, and he may convey, mortgage and devise the same, and if he shall die intestate the same shall descend to his heirs, and in all cases such lands be held conveyed, mortgaged or devised, or shall descend in like manner, and with like effect as if such alien were a native citizen of this territory or of the United States.

"Sec. 36. The title of any lands heretofore conveyed shall not be questioned nor in any manner affected by reason of the alienage of any person from or through whom such title may have been devised."

This law is not directly ~~reported.~~ repealed.

This was approved January 11, 1861. We will refer to section 1, chapter 2, and section 1, chapter 7, later.

In 1864, at the ninth session of the legislative assembly of the territory of Nebraska, the legislature re-enacted under the head "Of Real Estate and the Alienation Thereof by Deed," section 60, chapter 12, page 69, the paragraph known as section 62, chapter 31 of the laws of 1856. We do not find the law of 1856 repealed at any time prior to the passage of this act, so we have the law under the heading "Of Real Estate," section 62, chapter 31, passed in ~~January 11, 1861,~~ 1864 and under the law of "Settlement of Estates, etc.," sections 35 and 36, chapter I, passed in 1861, both in force.

In 1867, the code was compiled by E. Estabrook, embracing all the general laws of the state in force August 1, 1867. This code is adopted under an act passed and approved February 12, 1866, and is entitled, "An Act for revising, amending, consolidating and re-enacting the civil and criminal codes, and

the laws of a general nature, of the territory of Nebraska."

In these revised statutes compiled by E. Estabrook, we find the act passed in 1861, entitled "An Act providing for the settlement of the estate of decedents and for other purposes," re-enacted in the revised statutes word for word under chapter 14 of the revised statutes, and is entitled "Decedents" (see page 56, *et seq.*), except that sections 31 to 38, inclusive, chapter 1, of the laws passed in 1861 are omitted from the revised statutes of 1868; sections 31 to 34 refer to collection of rents, 35 and 36 to the right of aliens to hold real estate and 37 and 38 to the rights of a remainder-man to maintain an action. The acts of 1856 and 1861 were in force at least up to 1864, and from 1864 to 1866 the acts of 1861 and 1864 were in force until the compilation of the statutes of 1866.

Under the compilation of the statute, however, of 1866, under the title "Real Estate," we find on page 292, section 59, chapter 43, to be the same as section 62, chapter 31, of the laws of 1856, as well as the same as section 60, chapter 12, of the laws of 1864. That is to say, section 62, chapter 31, of the laws of 1856 and section 60, chapter 12, of the laws of 1864, is carried over into the revised statutes; but sections 35 and 36 of the law "Settlement of Estates, etc.," are not carried over.

In the constitution of the State of Nebraska adopted in 1866, we have this provision, article I:

> "Sec. 14. No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property."

This constitutional provision was re-adopted in the constitution of 1875. See constitution of 1875, section 25, article I.

In the constitution of 1875 we find these provisions:

Sec. 15, article III of the constitution of 1875 provides:

> "Sec. 15. (*Prohibited special legislation.*) The legislature shall not pass local or special laws in any of the following cases, that is to say, * * * Changing the law of descent."

Section 13, Article I, provides as follows:

> "Sec. XIII. (Justice administered without delay.) All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Section 59 of chapter 43 of the Code of 1866 was put in subsequent codes as section 54, chapter 73, and remained in full force and effect until 1887. In the acts of the legislature of 1887, we find the following:

> CHAPTER 62.
>
> "An Act to prohibit non-resident aliens from acquiring or holding real estate in the State of Nebraska and to amend section 54 of chapter 73 of the Compiled Statutes of Nebraska, entitled 'Real Estate,' and repeal said original section.
>
> *Be It Enacted by the Legislature of the State of Nebraska:*
>
> Section 1. That section 54 of chapter 73 of the Compiled Statutes of Nebraska, entitled 'Real Estate' be amended to read as follows:

Sec. 54. No non-resident alien shall hereafter acquire or hold any real estate or interest therein in the State of Nebraska by purchase, devise or descent.

PROVIDED, HOWEVER, That any alien now owning real estate or interest therein, may convey, mortgage or devise the same, and if he shall die intestate the same shall descend to his heirs, and such real estate or interest therein may be held, conveyed, mortgaged or devised by him, and shall descend in like manner, and with like effect, as if such alien were a native citizen of the United States.

Sec. 2. That said original section 54 herein amended and all acts and parts of acts in conflict herewith shall be and the same are, hereby repealed.

Approved March 31, 1887."

CHAPTER 65.

"An Act to prevent the acquiring of title to lands in the State of Nebraska, or the descent thereof to non-resident aliens; to provide for the escheating thereof on the death of the owner to the State of Nebraska; and for the payment to be made thereof, and for the disposing thereof.

Be It Enacted by the Legislature of the State of Nebraska:

Section 1. That no non-resident, alien foreigner, who has not declared his intentions to become a citizen of the United States, nor any corporation or association not incorporated under the laws of this state shall acquire or own, hold or possess by right, title, or descent, accruing hereafter, any real estate in the State of Nebraska.

PROVIDED, That the provisions of this act shall not apply to the real estate necessary for the construction and operation of railroads.

Sec. 2. That whenever any non-resident alien, who is the owner of real estate at the time of

the passage of this act shall die, his lands, which would have descended to his heirs, shall escheat or descend to the State of Nebraska; and the heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska at full value thereof as ascertained by appraisement upon the oaths of the judge, treasurer, and clerk of the county where such lands lay; and such lands shall then become subject to the law, and shall be disposed of as other lands belonging to the state.

PROVIDED, That the expense of appraisement shall be deducted from the appraised value of such land.

Sec. 3. Whereas, an emergency exists, therefore this act shall take effect on and after its passage and approval.

Approved March 31, 1887."

These laws so passed were repealed by the law brought into question in this case.

We wish to call attention to two sections of the laws passed in 1855 and 1856, in reference to descent, which, if repealed, are repealed by the law of 1861, under its general clause, which is as follows: "And all acts, and parts of acts inconsistent herewith are hereby repealed."

In the laws of Nebraska, 1855 and 1856, we find these general provisions of the law regarding descent:

"Section 174. If the intestate leave no issue, the one-half of his estate (including the dower of his wife), shall go to his father, and the other half to his wife, and if he leave no wife, nor issue, the whole should go to his father."

"Section 175. If his father be previously dead, the portion which would have fallen to his share by the above rule, shall be disposed of in the same manner as though he had outlived

the intestate and died in the possession and ownership of the portion thus falling to his share, and so on through each ascending ancestor and his issue, unless heirs are sooner found."

We now again will refer to the law for the "Settlement of estates of decedants and for other purposes" passed and approved January 11, 1861. Section 1, chapter 2, contains the following provision as originally enacted. This is section 30, chapter 14, Esterbrook's code, and is classified in that code and all codes subsequent up to 1889 as follows:

TITLE TO REAL ESTATE BY DESCENT.

(*Order of Descent.*) "When any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: *First.* In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the intestate living at his death, his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally; otherwise they shall take according to the right of representation.

Second. If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father.

Third. If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, *by right of representation;*

Provided, That if he shall have a mother also, she shall take an equal share with his brothers and sisters.

Fourth. If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister surviving at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister.

Fifth. If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote; *Provided, however,*

Sixth. If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child, by inheritance from such deceased parent, shall descend in equal shares, to the other children of the same parent and to the issue of any such other children who shall have died, by right of representation.

Seventh. If, at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child, by inheritance from his said parent, shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally; otherwise they shall take according to the right of representation.

Eighth. If the intestate shall leave a widow, and no kindred, his estate shall descend to such widow.

Ninth. If the intestate shall have no widow, nor kindred, his estate shall escheat to the people of this state."

The foregoing and the following section of an act "regarding the settlement of estates, etc.," were a part of the same act as section 35 and 36 heretofore referred to.

Chapter 7 of the laws of 1861 regarding "Settlement of Estates, etc.," contains the following provision as to the "Administration and Distribution of the Estates of Intestates":

"Sec. 1. When any person shall die possessed of any personal estate or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows:

1st. The widow, if any, shall be allowed all articles of apparel and ornament and all wearing apparel and ornaments of the deceased, the household furniture of the deceased, not exceeding in value two hundred and fifty dollars; and other personal property to be selected by her, not exceeding in value two hundred dollars, and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate.

2nd. The widow and children constituting the family of the deceased shall have such reasonable allowance out of the personal estate as the Probate Court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after granting administration, nor for any time after the dower and personal estate shall be assigned to the widow.

3rd. When a person shall die, leaving children under seven years of age, having no mother, or when the mother shall die before the children shall arrive at the age of seven years, an allowance shall be made for the necessary maintenance of such children until they arrive at the age of seven years, out of such part of the personal estate and the income of such part of the real estate as would have been assigned to their mother if she had been living.

4th. If on the return of the inventory of any estate, it shall appear that the value of the saleable estate does not exceed the sum of one hundred and fifty dollars the Probate Court may, by a decree for that purpose, assign for the use and support of the widow and children of such intestate and for the support of the children under seven years of age, if there be no widow, the whole of such estate after the payment of the funeral charges and expenses of administration.

5th. If the personal estate shall amount to more than one hundred and fifty dollars, and more than the allowances mentioned in the preceding subdivisions of this section, the same shall be applied to the payment of the debts of the deceased with the charges of his funeral and of settling his estate.

6th. The residue, if any, of the personal estate shall be distributed in the same proportions and to the same persons, for the same purposes as prescribed for the descent and disposition of the real estate, except that the widow, if any, shall be entitled to receive the same share of such residue as a child of such intestate would be entitled to."

These laws were all adopted as section 176, chapter 14, in the Code of 1867 and remained in force until 1889, at which time a new law of descent in

reference to real estate was adopted, which was, however, declared unconstitutional a few years later.

So we have in force at the time of the death of John Toop, the law of descent as passed in 1861. The Act of March 16, 1889, being the law in question, which stands in place (if constitutional) of section 54 of chapter 73, revised statutes in force at and prior to 1887. Section 54 being the same as section 59, chapter 43, revised statutes of 1867, entitled "real estate."

ARGUMENT.

THE STATUTE IN QUESTION IN THIS CASE VIOLATES SECTION 2, ARTICLE 6 OF THE CONSTITUTION OF THE UNITED STATES.

Section 2, article 6 of the Constitution of the United States, vests in the President and Senate of the United States, full authority to make all the treaties ~~and laws~~, which shall be the supreme law of the land.

John Toop died in November, 1897, intestate, in Butler county, Nebraska. He left him surviving a widow. He had no children, nor descendants of children. His father and mother had long predeceased him in England. They were born, lived and died as English subjects. He had had a brother and two sisters, who had lived to maturity, and had children. The plaintiffs in error are the descendants of William Toop, a brother, and Betsey Or-

chard, a sister. Both William Toop, the brother, and Betsey Orchard, the sister, having died prior to the death of John Toop in England. One sister, Mary Ann Plowman, came to this country. She died in this country prior to the death of John Toop, and she left her surviving, Sarah J. Dyer and Emma Tremlin, her children, and William J. Toop, Jesse Toop and Florence Behrend, grandchildren, and it is through the children and grandchildren of Mary Ann Plowman that the Ulysses Land Co. and the Northwestern Mutual Life Insurance Co. claim title to this land. At the time of John Toop's death, his only heirs at law in Nebraska, were his widow, and at her death, were his nephews and nieces and grandnephews and grandnieces, children and descendants of children of William Toop, Betsey Orchard and Mary Ann Plowman. John Toop was born in England.

In 1900 the treaty between Great Britain and the United States was adopted. Article 1 of that treaty provides:

> "Where on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would by the laws of the land pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such property is situated, such citizen or subject shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof without restraint or interference and exempt from any probate or administrative duties or charges other than those which may be imposed in like cases upon the citizens or sub-

jects of the country from which such proceeds may be drawn."

By section 5 of this treaty the subjects of Great Britain are granted the same rights as those of the most favored nation.

Upon the death of John Toop in 1898, this real estate by the law of Nebraska, descended to his widow, Sarah J. Toop, *to be held, possessed and enjoyed* by her during her natural life. Not until the death of Sarah J. Toop, the widow, did it pass to the heirs of John Toop. The heirs of John Toop include the plaintiffs in error. It is undoubtedly true that the law of descent in Nebraska, ~~enforced~~ since at the date of John Toop's death, determined who were his heirs as a class. By that law the descendants of the deceased brother and sisters were his heirs. The effect of that law was to *restrict* the right to acquire and hold title to certain real estate. There is a broad distinction between taking as heir, and being qualified to hold and retain real estate. and none of the heirs of John Toop were entitled to take or hold any of the real estate until the death of the widow.

An interesting case is *Runyan* v. *The Lessee of Coster et al.*, 14 Peters, 122. In that case a corporation was incorporated under the laws of New York for the purpose of purchasing and developing coal lands in Pennsylvania, to supply coal to the City of New York. The company purchased and took title to extensive coal lands. Suit in ejectment was brought on the contention that the trustees of the New York corporation could not take the estate conveyed to them under the laws of Pennsylvania.

Mr. Justice Thompson, in delivering the opinion of the court, said (page 131):

> "The doctrine of the Supreme Court of Pennsylvania, in the case of *Leasure* v. *Hillegas*, 7 Binney, 313, is directly applicable to this case. The question then before the court was as to the right of the Bank of North America to purchase, hold, and convey the lands in question; and the court took the distinction between the right to purchase and the right to hold lands, declaring them to be very different in their consequences; and that the right of a corporation in this request was like an alien, who has power to take, but not to hold lands; and that although the land thus held by an alien may be subject to forfeiture after office found, yet until some act is done by the government, according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser; but he can convey no estate which is not defeasible by the commonwealth. Such being the law of Pennsylvania, it must govern in this case."

Only the state could object to the holding of this real estate by the plaintiffs as heirs.

Carlow v. *Aultman*, 28 Neb. 672.

The treaty-making power of the United States is retroactive as well as prospective.

Hauenstein v. *Lynham*, 100 U. S. pages 483-489.

Mr. Justice Swayne in that case said:

> "It will be observed that the treaty-making clause is retroactive as well as prospective."

He also said in the same case:

> "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the lat-

ter is to be preferred. *Shanks* v. *Dupont*, 3 Pet. 242. Such is the settled rule in this court."

He also said:

"It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national policy."

Under the laws of Nebraska the heirs of John Toop could not enter into the enjoyment of the inheritance during the life of the widow. She died in 1907. Long before this date the treaty in question had removed any disqualification of the plaintiffs under the act in question.

Hauenstein v. *Lynham, supra.*

In the opinion in that case Mr. Justice Swayne said:

"In *Chirac* v. *Chirac* (2 Wheat. 259), it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The state law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* v. *Banks* (10 *id.* 181), and with respect to the British treaty of 1794, in *Hughes* v. *Edwards* 9 *id.* 489). A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a state. *Orr* v. *Hodgeson*, 4 *id.* 453. By the British treaty of 1794, 'All impediment of alienage was absolutely leveled with the ground despite the laws of the states.'"

In Bennett v. *Bennett,* 217 Ill. page 434, the question arose as to the time when a legacy takes effect. In that case, which involved the question of a spendthrift trust, the point is made as to the time of the vesting of the estate, and it is held that where the property is to vest at a fixed time, that it does not vest prior to that time. In this case, under the law of descent which was passed in 1861, and was in force at the death of John Toop, the second clause under the law of descent of real estate provided:

> "2. If he shall have no issue, his estate shall *descend* to his widow during her own life, and after her decease, to his father, and if he shall have no issue, nor widow, his estate shall descend to his father."

Therefore assuming that John Toop had left a father at the time of his death, his father would have taken but a contingent remainder in the estate of John Toop, for the reason that it is declared positively in the statute that it does not descend to the father during the lifetime of the widow. It is apparent for several reasons that if John Toop had left a father and a widow and the father had died prior to the death of the widow, that the father does not under that statute take a vested or inheritable estate, because:

(a) It is positively declared that the wife takes an estate by descent for her natural life, and after her death it goes to the father.

(b) If he left no widow, and died leaving a father, then it would descend entirely to the father.

(c) Subdivision 3 of the same law of descent provides if he shall have no issue, nor widow, nor

father, the estate shall descend in equal shares to his brothers and sisters, and the children of the deceased brother or sister by right of representation, provided that if he shall have a mother also, she shall take an equal share with the brothers and sisters.

Therefore, if we give the fair construction of the language of the statutes of Nebraska in force at the time of John Toop's death, several conditions must be dispensed with, prior to the collateral heirs being vested in the estate.

First. There must be no issue of the deceased living.

Second. If he was married, the widow must have died.

Third. He must have left no father.

The interest, or life estate, which the widow gets, is contingent upon there being no children. The title which the father takes is contingent upon there being no children and upon the death of the widow. The interest which the brothers and sisters and mother have, is contingent upon there being no issue, the death of the widow, and the death of the father.

Under the statute, as it reads, the widow takes no interest in the real estate if there are children living. If there are no children born and living, she does take the absolute enjoyment of the estate, as against the whole world for her natural life, at least.

The father is the next one, and it is very clear that if the father of John Toop had been living at

the time of his death, the interest which he might take, would be postponed to the widow's death.

At most, we say, therefore, that while the estate may vest in the heirs as a class, it is a contingent vesting, which may be defeated at any time prior to the happening of the time when they come into the enjoyment of their estate.

Undoubtedly, authorities will be submitted from Nebraska, to the effect that the estate vests in the heirs upon the death of the owner of the real estate, but it must be born in mind that while these heirs as a class may have an interest in the estate, it is subject to be divested before they acquire the enjoyment thereof. They have no right to partition the estate, or determine their rights prior to the death of the widow, see *Alexander* v. *Alexander*, 41 N. W. Rep. 1065, 26 Neb. 673.

The law gives a widow no interest in the real estate of the husband, where there ~~an~~ *all* issue living, but it does give to the mother an interest in the real estate of the son when the right of inheritance is fixed. Assuming, therefore, that John Toop left widow and father and a mother, brothers and sisters, and the father should have died prior to the death of the widow, would the mother be excluded from taking because the father of John Toop had survived him, or would the mother be entitled to take at the death of the widow, if she survived the widow of John Toop? It would seem that there can be no question as to the time the estate descends to the next of kin, and that there is no completely vested estate in anybody so long as the widow survives. Their interest at most is a contingent interest, and

the title is held in abeyance until the death of the widow; in other words, the title is held in trust by the widow for the benefit of the surviving next of kin at her death. That next of kin may be, first, the father; second, the mother, brothers and sisters, or third, the descendants of the mother, brothers and sisters. If John Toop had died leaving a widow, a father, mother and a brother, the property would have descended to the widow for her life. If the father had died prior to the widow, the property would have descended to the mother and brother upon the death of the widow. If the mother had died prior to the death of the widow, it would have descended to the brother upon the death of the widow. If the brother had died, the mother would have taken the entire estate upon the death of the widow, and not before.

The law of descent in force, is divided into nine paragraphs. The first paragraph gives the property to the issue of the deceased absolutely, if he dies leaving issue. That is to say, the property should go in equal shares to the children if there are children living at his death; if there are not, it goes to the descendants of the children, not by the right of representation, but if they are of equal degree, they shall take the estate equally, otherwise by right of representation. That paragraph of the section of descent of real estate is complete in itself.

The next paragraph is the paragraph under consideration, and provides, "If he shall have no issue, his (real) estate shall descend to his widow during her natural lifetime, and after her decease, to his

father." Therefore, it clearly does not go to the father until the widow's death, but if he have no issue nor widow living, his estate shall descend to his father. It is apparent that that limits the estate in the father, making the vesting contingent in the father upon him surviving the widow.

The third paragraph must be taken also into consideration, which provides, "If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and the children of any deceased brother or sister, by right of representation," and so on through each of the succeeding paragraphs.

It is made contingent that, first, before a descended estate will pass to his brothers and sisters, that he must have no issue; if he leaves a widow, it is clear that if he leaves issue, the widow does not take interest in the real estate, her interest is contingent upon there being no issue:

Second, if he leaves a widow and no issue, the father does not take until the death, at least, of the widow.

Third, if he leaves a father, the father takes to the exclusion of the brothers and sisters.

Fourth, if he leaves no children, widow or father, then the brothers and sisters and mother take, but if he leaves either issue, children, or a widow, or a father, the brothers and sisters do not take, at least anything, until the death of the widow or father.

This is apparent by the decision of the Supreme Court of the state, in the case of *Alexander* v. *Alexander*, 26 Neb. 68, 41 N. W. Rep. 1065.

It is our contention, therefore, that under the foregoing authorities and the treaty, plaintiffs in error have an absolute right to two-thirds of the land in question in common with the defendants, acquired from a common source, namely, John Toop; that they have ten years from the date of the widow's death, namely, in 1907, to either become residents of the State of Nebraska, or to sell and dispose of their interest to a bona fide purchaser; that neither of the plaintiffs nor the defendants, became entitled to hold said lands within the meaning of the law until the date of the widow's death, notwithstanding they derived title through John Toop, and upon failure to do one or the other of two things, namely, to become residents of Nebraska, or sell the land, the state, and the state only has the right to escheat the land, and until the state takes such steps to take the land, no other disposition can be made ~~out~~ of it.

That the treaty protects the rights of the English heirs because the statute postpones the right of enjoyment at least until the death of the widow; during the time she lived, she was holding the title by descent for whoever might be entitled to at her death.

Therefore, we claim that under the constitution, article 6, section 2 of the Constitution of the United States and the treaties made in pursuance thereof, that this alien law of Nebraska passed in 1889 is void as applied by the trial court.

THE ACT IN QUESTION VIOLATES THE 14TH AMENDMENT ~~IN~~ TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES, AMONG OTHER THINGS, "NOR SHALL

ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW," NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

Section 13, article 1, of the constitution of the State of Nebraska, provides, "All courts shall be open to *every person* for any injury due him in his lands, goods, person or reputation, and shall have a remedy by a due course of law and justice, without denial or delay."

The question which presents itself here is, can a state forfeit the property of one citizen, dying intestate, leaving only non-resident alien heirs, and not that of another citizen dying intestate leaving only non-resident alien heirs, because there happens to be a treaty with one government, and not with another. Under this provision of the 14th Amendment, as amplified by the constitution of the State of Nebraska, it is not the equal protection of the laws, to allow to non-resident heirs of non-resident aliens holding real estate at the time of the passage of the act in question ~~to~~ their inheritance, and refuse the same to non-resident alien heirs of resident aliens or citizens.

The construction which the counsel for defendants in error will attempt to give to this law will undoubtedly be that non-resident heirs of non-resident aliens are given rights that non-resident heirs of resident aliens and citizens are deprived of. This is rank discrimination against the people of the the state and denies to them the equal protection of the law.

Counsel for defendant in error will undoubtedly contend that the ten-year period in the first section of the Act of 1889 protects only non-resident alien heirs of non-resident aliens. We submit that such a construction would make the act clearly unconstitutional.

Defendants in error will also undoubtedly contend that if this act must fall because unconstitutional, that the laws of 1887, chapter 65, containing an absolute prohibition against non-resident aliens of every class acquiring title to real estate would be enforced. Such, however, cannot be the case.

Section 5 of the law of 1889 specifically repeals sections 54, 63 and 64 of chapter 73 of the compiled statutes of 1887.

Section 54 of the laws of the Revised Statutes in force prior to the legislature of 1887 was attempted to be amended by chapters 62 and 65 of the acts of the legislature assembly of 1887. Sections 63 and 64 of chapter 73 of the laws of 1887, both of these acts were passed, as we have seen heretofore, and approved March 31, 1887.

The constitution of the State of Nebraska, 1866, section 14, article 1, also constitution of 1875, Art. 1, Sec. 25, provides, "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." This provision has always been in the constitution in the State of Nebraska.

The law in question does not prohibit non-resident aliens from acquiring or holding real estate, but by process of elimination, apparently is designed

to restrict non-resident aliens in acquiring agricultural or mineral lands.

Section 1 of the law of 1889, may be intended to limit the right of inheritance for ten years to the non-resident widows and heirs of non-resident aliens. If read literally, the widows and heirs of aliens, whether resident or non-residents, may take.

If that statute is intended to limit the inheritance to the non-resident widows and heirs of aliens, something must be supplied. Looking to the title of the act, we see that it is to restrict non-resident aliens and corporations in their right to acquire and hold, and when we read the act in connection with the title, the title being restricted to the right to acquire and hold, then it must be assumed that there is an equal right vested in non-resident widows and heirs of citizens, as well as aliens, to acquire and hold.

Sections 3 and 4 give to non-resident aliens the following rights:

Section 3, to sell, during their lifetime, lands which they may have acquired and take security for the purchase price and all the rights as a citizen of the United States.

Section 4, to hold for a period of ten years any land that they may acquire by reason of any valid lien.

Section 4, to acquire any land necessary for railroad purposes.

Section 4, to acquire any land for the purpose of erecting and maintaining a manufacturing establishment.

Section 4, to acquire any land lying within the corporate limits of cities and towns.

It will be observed that the only lands which the statute attempts to prohibit non-resident aliens from owning is agricultural and mineral lands.

Therefore, it is apparent that if these lands of which John Toop died, seized or possessed, were all within the corporate limits of any town or village, or purchased for manufacturing establishments, or for railroad purposes, or taken in by reason of some lien which he had acquired on said lands during his lifetime, the land would descend to his non-resident alien heirs, as well as to his resident alien heirs. If John Toop had been an alien at the time of his death, if we read the statute literally, and these lands were agriculture or mineral lands, his widow or heirs would have taken them, and could have disposed of them within the period of ten years, and it would make no difference whether they were non-resident or resident aliens.

The construction which the court below has placed upon the law that only non-resident aliens, being the widows and heirs of aliens can take, is to take away the rights of complainants, without due process of law, and the effect of that decision is that complainants not only have their rights taken away without process of law, but are denied the equal protection of the law, although under the laws of Nebraska, non-resident aliens have inheritable blood.

What conclusion can be drawn when we consider the laws of Nebraska, in reference to aliens; descent; title to real estate, and all laws in force at

the time of John Toop's death in 1898, in connection with the history of the laws adopted in Nebraska, and prior to 1889, other than that the law violates the 14th Amendment of the Constitution of the United States.

Section one, places one taking by descent in the same class as one taking by purchase, or one taking by devise, or by grant or by any other means.

Counsel for defendants in error may endeavor to show that the alien heirs have no inheritable blood, that the law casts the descent of this property upon the resident heirs, that the non-resident alien heirs acquire no benefits from the property, that the statute in question does not require ~~the~~ action on the part of the state to forfeit the rights, because forfeiture provided in the state only applies to the lands held contrary to section 1, and not those held contrary to sections three and four.

It is apparent (and may be conceded) that a non-resident alien in Nebraska has inheritable blood. That is to say, the laws of Nebraska recognize that a non-resident alien has inheritable blood, but tries to exclude such non-resident alien heir from holding two classes of property, namely, agricultural and mineral property, outside of towns and villages. An alien has inheritable blood as to any agricultural or mineral lands lying within the limits of towns and villages. He has inheritable blood as to any manufacturing property, as to any railroad property, as to any property acquired under lien or foreclosure of mortgage for at least ten years, and property where his ancestor was a non-resident alien, also to any lands lying within the corporate limits of towns

or villages. Therefore, it is apparent this statute means when it says, "And it shall be the duty of the county attorney where such lands are situated, to enforce forfeitures of all such lands as is provided in this act," that non-resident aliens do inherit, not merely the lands acquired by a widow and heirs of a non-resident alien but all lands. The act recognizes the right of aliens to inherit. It recognizes that right by reason of its saying that there must be a forfeiture. If a foreign corporation bought land in the State of Nebraska, there must be a forfeiture by the state. The state gets no title until office found. If a citizen of England purchases from a citizen of Nebraska property, he takes the title and holds title thereto until office found. If a non-resident alien dies, his widow and heirs take and hold title for ten years absolutely, and can convey a good, indefeasible title at any time prior to the forfeiture thereof by the estate in direct proceedings, whether it be within ten or within fifty years. If a non-resident alien purchases a title on which he has a lien, or if he forecloses a lien and acquired title through such lien, he can reconvey and give title at any time until the state forfeits his right. If a non-resident alien buys manufacturing property, he has a good title until office found, whether ten or fifty years.

The statute has placed inheritances in the same class with purchasers and grantees. Heirs take by descent and hold until office found.

In the case of *Pembrooke* v. *Huston,* Supreme Court of Mo., 79 S. W. Rep. 470, 180 Mo. 627. Action to rescind a contract for the purchase of real

estate on the theory that complainant was a non-resident alien and could not acquire title. Sections 4764 and 4766 of Statute of Missouri, see opinion of court, page 471, call in question the point which we wish to raise.

"Sec. 4764. It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries; which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

"Sec. 4766. All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the State of Missouri, and it shall be the duty of the attorney-general, or circuit or prosecuting attorney of the property city or county, to enforce every such forfeiture by bills in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provision of this chapter, it shall be the duty of the court to determine the very right of the matter, without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights, either of the state or of the parties concerned, in any such proceeding arising out of the matters in this chapter mentioned."

On page 472 the court said:

> "When the legislature in the Act of 1895 said it shall be unlawful for an alien to acquire land by purchase, it did not mean that an alien, in taking a deed to the land, was to be regarded as a lawbreaker, or one guilty of an offense, but it only meant that the right that had been conferred on him by the Act of 1872 was withdrawn, and that the disabilities that the common law had formerly imposed were now to be imposed by statute, except as in the statute itself otherwise provided. Some of the words of the statute give plausibility to the contention that title cannot pass to the alien at all, the words being that it shall be unlawful for the alien 'to hereafter acquire,' etc.; but when those words are taken with the immediate context, that idea disappears. The language is that it shall be unlawful for the alien 'to hereafter acquire, hold or own real estate so hereafter acquired.' The sense is awkwardly expressed. There could be 'no real estate so hereafter acquired,' if we give literal meaning to that part of the sentence which says that it shall be unlawful 'to hereafter acquire' such property. This meaning is further shown by the language in the beginning of section 4766: *'All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the State of Missouri,' etc. That is an express recognition that real estate might be acquired by an alien after the passage of the act, but that whenever the state called for it the alien should surrender it.*"

~~In~~ The case of *Osterman* v. *Baldwin*, 73 U. S. 116, rests on the question of the right of Baldwin to certain land which he had bought in the State of Texas prior to its admission to the United States, the title of which was taken in one Holman, and which was sold to Osterman under execution against Holman.

It appears that when Baldwin purchased land in Texas, it was a foreign country, with a constitution forbidding aliens to hold real estate. But the defendants cannot object on that ground. Until office found, Baldwin was competent to hold land against third persons. No one has any right to complain in a collateral proceeding, if the sovereign does not enforce its prerogative.

> "This court, in *Cross* v. *DeValle*, 1 Wallace, p. 8, said: 'That an alien may take by deed, or devise, and hold against any one but the sovereign, until office found, is a familiar principle of law, which it requires no citation of authorities to establish.' Even if the defendants could have made this objection, while the Republic of Texas existed, they cannot make it *now*, because, when Texas was admitted into the Union, the alienage of Baldwin was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title."

In the case of *Manuel* v. *Wulff*, 152 U. S. 505, is an action to contest a mining claim, where the same general principle is announced.

In the case of *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 603, speaking on the question of forfeitures, this court said on page 622:

> "But it is contended, first, that the common law as to inquests of office and seizure, so far as the same respects the lands in controversy is completely dispensed with by statutes of the commonwealth, so as to make the grant to the original plaintiff in 1789 complete and perfect. and secondly, and further, if it be not so, yet as the devisee died pending the suit, the freehold

was thereby cast upon the commonwealth without an inquest, and thus arises a retroactive confirmation of the title of the original plaintiff, of which he may now avail himself. As to the first point, we will not say that it was not competent for the legislature (supposing no treaty in the way), by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage. *But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings.* No part of the United States seems to have been more aware of its importance, or more cautious to guard against its abolition than the commonwealth of Virginia. It prevents individuals from being harassed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly by a traverse of the office. It affords an opportunity for the public to know the nature, the value and the extent of its acquisitions *pro defectu haeredis;* and above all it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed to be repealed, unless the language of the statute be clear and explicit for this purpose."

In *Jackson* v. *Adams,* 7 Wendell N. Y. 368, on page 371, the court said:

"Helme, then, had an estate of inheritance in the premises in question, which he was capable of transmitting to his heirs. It did not vest (as in the case of a mere alien) upon his death, by force and operation of law in the state, but it descended to his heirs, if he had any; and the state had no right to enter upon, or dispose of the premises, until they had pursued the meas-

ures pointed out in the act concerning escheats (1 R. L. 379) for ascertaining whether he had any heirs; if it was found that he had no heirs, those measures would necessarily result in giving the state a perfect title by escheat. Helme stood in the same condition, in this respect, as any other citizen of the state; if any natural born citizen dies without heirs, his lands escheat, but the state has no right to enter and take possession until office found. and any grant that they may make of such lands, whether by patent or otherwise, can convey no title, because, until office found, the state has no title, as every man is presumed to have heirs, until the contrary is shewn."

In the case of *Blythe* v. *Hinckley,* 180 U. S. 333, the court said on page 340:

"Questions have arisen as to the rights of aliens to hold property in a state under treaties between this government and foreign nations which distinctly provide for that right, and it has been said that in such case the right of aliens was governed by the treaty, and if that were in opposition to the law of the particular state where the property was situated, in such case the state law was suspended during the treaty or the term provided for therein."

On page 341 the court said:

"In *Lessee of Levy* v. *McCartee,* 6 Pet. 102, the question was in regard to the law of New York and the right of an individual to inherit through an alien title to real estate in that state. Mr. Justice Story delivered the opinion of the court, in which he stated that the question resolved itself into 'whether one citizen can inherit in the collateral line to another, when he must make his pedigree or title through a deceased alien ancestor. The question is one of purely local law, and, as such, must be decided by this court.'"

In the case of *Johnson* v. *Eversole Lumber Co.*, 57 S. E. Rep. 519, was an action for damages for cutting timber. The plaintiff claimed title by conveyance through one Foster, who acquired title by said grant. The court say, page 520:

> "If, as defendant contends, Foster was an alien, the law at that time applicable to Cherokee lands (which this was) did not debar aliens. Laws 1852, p. 616, c. 169. The general land law did not apply to these lands as was expressly provided. Section 21, chapter 18, p. 44, Laws 1854-55. But, even if an alien was prohibited from entering these lands, the state only could divest his title, for 'an alien has capacity to take, but not capacity to hold, land. * * * He cannot hold it against the covereign, should the sovereign choose to assert his claim thereto, as forfeited. But against all the rest of the world the alien has full capacity to hold, and he can hold even against the sovereign until the estate of the alien be divested by an office found, or some other equally solemn act."

Therefore, it is apparent that the effect of the construction placed upon the act by the trial court, in denying that plaintiffs in error have any rights, that the title vested in the children of Mary Ann Plowman absolutely, exclusive of the rights of the plaintiffs in error, and that thereby the defendants in error acquired a good title through the children and grandchildren of Mary Ann Plowman, is to deny the plaintiffs in error due process of law and the equal protection of the law.

For another reason this law violates section 2, article 6 and the fourteenth amendment of the Federal Constitution, and the treaties and laws made in pursuance thereof.

The law in question applies to a part of a class of individuals, and to a part of certain class of property.

(a) It discriminates between non-resident aliens, and

(b) It discriminates between the heirs of citizens.

(a) The law of 1889, section 1, includes all non-resident alien heirs of non-resident aliens, who held real estate in the State of Nebraska at the time of the act, and it excludes all non-resident alien heirs of citizens or aliens who held real estate in Nebraska at the date of the passage of the act, unless they are protected by the treaty.

It will be noticed in reading the law of 1889, it makes no distinction between the residents and citizens of Argentine, Bolivia, Brazil, Brunswick and Luxemburg, Columbia (New Granada), Dominican Republic, France, Germany, Italy, Russia, Sweden, Switzerland, and other nations, under the treaty rights of all these various countries, and possibly many others, the citizens of those countries, residing in those countries, have the right to inherit and take property (real and personal), farm lands, as well as others, in the State of Nebraska, and the state cannot pass any law denying them that right, and in passing a law that non-resident aliens, generally, as a class, cannot take, that law (unless the construction which we have contended for is placed upon it) necessarily violates this provision of the federal constitution.

The laws and treaties and constitutions of the United States are just as much a part of the laws

of the State of Nebraska, as though they were read into the constitution and laws of the State of Nebraska, and were a part thereof, and to maintain that non-resident aliens cannot inherit or hold or take or dispose of real estate, violates the treaties with the foregoing countries, and it therefore places one class of non-resident aliens against another class of non-resident aliens, that is to say, it places the Russian class in a class that can take, and an Englishman and Irishman in a class that cannot take. That kind of a classification is not warranted, either by section 2, article 6 or the fourteenth amendment, Constitution of the United States, and is particularly excluded by section 15, article 3 of the Constitution of the State of Nebraska, which provides:

> "The legislature shall not pass the local or special laws in any of the following cases, that is to say, * * * changing the law of descent."

And we will discuss this provision of the state constitution, possibly a little further, hereafter, but we will look to some of the treaties now in force, in reference to the passing of real estate.

The treaty with Argentine, article 9, of 1853, Vol. 7, Federal Statutes Annotated, page 412, so far as it affects real estate, reads as follows:

> "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the

laws of the country, for the benefit of the creditors and legal heirs."

The treaty with Russia, article 10, of 1832, Vol. 7, Federal Statutes Annotated, page 779, is as follows:

"The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the representatives, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are. And where, on the death of any person holding real estate, within the territories of one of the high contracting parties, such real estate would by the laws of the land descend on a citizen or subject of the other party, who by reason of alienage may be incapable of holding it, he shall be allowed the time fixed by the laws of the country; and in case the laws of the country actually in force may not have fixed any such time, he shall then be allowed a reasonable time to sell such real estate, and to withdraw and export the proceeds without molestation, and without paying to the profit of the respective governments any other

> dues than those to which the inhabitants of the country wherein said real estate is situated shall be subject to pay in like cases. But this article shall not derogate in any manner from the force of the laws already published, or which may hereafter be published, by His Majesty, the Emperor of all the Russians, to prevent the emigration of his subjects."

The treaty with Bolivia, article 12, 1858, Vol. 7, Federal Statutes Annotated, page 444, in so far as it relates to real estate, is as follows:

> "And if, in the case of real estate, the said heirs would be prevented from entering into the *possession of the inheritance on account of their character of aliens,* there shall be granted to them the longest period allowed by the law to dispose of the same as they may think proper, and to withdraw the proceeds without molestation, nor any other charges than those which are imposed by the laws of the country."

Article 11 of the treaty of 1828 with Brazil, Vol. 7, Federal Statutes Annotated, page 444, is to the same effect as the treaty with Bolivia, except that the clause in regard to real estate permits three years instead of a reasonable time.

The treaty with Brunswick and Luxemberg of 1854, article 2, Vol. 7, Federal Statutes Annotated, page 460, is similar to the Bolivian treaty.

The treaty with Columbia (now New Granada), article 12, of 1846, Vol. 7, Federal Statutes Annotated, page 506, is as follows:

> "The citizens of each of the contracting parties shall have power to dispose of their personal goods or real estate within the jurisdiction of the other, by sale, donation, testament or otherwise; and their representatives, being

citizens of the other party, shall succeed to their said personal goods or real estate, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases."

The treaty with France of 1853, article 7, Vol. 7, Federal Statutes Annotated, page 552, is as follows:

"In all the states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves, and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the states of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance, as are enjoyed there by its own citizens."

This treaty has been much in discussion and has been passed upon in the case of *Geogroy* v. *Riggs*, 122

U. S. 258, and *Bahaud* v. *Bize,* 105 Fed. Rep. 485, where it was construed by Judge Munger, in the Federal Court for the District of Nebraska.

The treaty with Germany of 1871, article 10, Vol. 7, Federal Statutes Annotated, page 559, while worded differently, is similar in effect to the other treaties.

The Italian treaty of 1871, article 22, Vol. 7, Federal Statutes Annotated, page 659, provides in regard to real estate, that its citizens shall have the same rights as the most favored nations.

The Swedish treaty of 1783, article 6, Vol. 7, Federal Statutes Annotated, page 828, perhaps does not as fully protect the rights as to real estate as the other treaties, and is as follows:

> "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects, either by testament, donation, or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession even *ab intestato,* either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *'droit de detraction'* on the part of the government of the two states, respectively. But it is at the same time agreed that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in full force and vigor. The United States, on their part, or any of them, shall be at liberty

to make, respecting this matter, such laws as they think proper."

It has been construed, however, in the case of *Adams* v. *Akerlund,* 168 Ill. 632, as giving the subjects of Sweden the right to hold real estate notwithstanding the law of Illinois prohibited, absolutely, non-resident aliens from inheriting real estate.

A like effect was given to the Swedish treaty by the Supreme Court of Nebraska in the case of *Erickson* v. *Carlson,* 145 N. W. Rep. 352.

The treaty of Switzerland of 1850 is perhaps the most comprehensive of any of the treaties and protects the citizens of each of the contracting parties, and their right to withdraw real estate to a greater extent than any other treaty, unless it may be the Russian treaty.

See article 5, treaty with Switzerland, Vol. 7, Federal Statutes Annotated, page 842.

The foregoing treaties are a few which we understand are now in force.

The treaty with France was construed by Judge W. H. Munger, of the Circuit Court, in the case of *Bahaud* v. *Bize,* 105 Fed. 485, which is a suit for partition of real estate in the State of Nebraska. Partition was granted and an accounting ordered. In that case the law of 1889, which we are discussing here, was taken into consideration. It was then in force. It was held in that case, that the treaties are the supreme laws of the land and authorities cited for that contention, and which position cannot be disputed. That the law of the state must give

way to the treaties and the constitution of the United States. In that case, while it does not say that the land in question was farm land, it necessarily must have been farm land, for the reason that the law regarding town lots could not have been questioned, because if they were town lots, there could have been no dispute over the matter. Judge Munger says:

> "Hence it is clear that Nebraska is one of the states of the Union which authorizes aliens to hold real estate and that the provisions of the treaty referred to are applicable thereto."

In that case he makes no distinction between town lots and farms.

(b) The law in question discriminates between non-resident aliens heirs of citizens, and non-resident alien heirs of resident aliens, in that its effect is to bring within the law all these non-resident alien heirs protected by treaties enabling them to take title and to hold it for ten years, and excludes all non-resident alien heirs not so protected.

To illustrate, if John Toop had been born in Germany, and had married there. To him and his wife a son William had been born, who remained a German subject. Toop and his wife afterwards removed to France. While living in France, another son was born, whom we will call Henry, and who, under the laws of France, becomes a French citizen. Subsequently Toop and his wife come to America and settle in Nebraska, and acquire real estate here. Assume that when he dies, his two sons were his only heirs, one a German citizen, and the other a French citizen. Assume that he left both

real and personal property, and no father or mother. As counsel for defendant will probably seek to construe it, the German subject would take a portion of the personal property, but would take none of the real estate. The French subject would take part of the personal property, and all of the real estate. If it were written in the act itself that all non-resident alien heirs protected by treaties shall come within the ten-year provision, and all non-resident alien heirs not so protected, shall not come within the provision, would the act be valid?

As another illustration of this very point, if John Toop's property had been manufacturing or railroad property, or all town lots, then the German subject would have taken his share in the real estate equally with the French citizen.

Therefore, it would be fair to say that any construction of this act which denies to any non-resident alien, the right to inherit land of any kind, character or description in the State of Nebraska, violates the protection guaranteed by the 14th Amendment of the Constitution of the United States, in that it attempts to transfer title from one class of people recognized by the constitution and laws of the State of Nebraska and entitled to hold land to another class of people also recognized by the law to hold land without due process of law, and denies the equal protection of the laws. That is to say that a non-resident alien is not prohibited from holding land in the state, no matter what country he comes from, if it is within the corporate limits of towns or villages, manufacturing property, railroad property, property acquired under any mort-

gage or lien, even though the latter may be town lots, farm property or mineral lands, but it is the character of the land itself which the statute attempts to restrict the non-resident aliens from holding, namely, agricultural or mining lands, and then only to a certain class of non-resident aliens, namely, those not protected by treaty.

Therefore, it will be seen from any analysis which may be made of the law of 1889, that a non-resident alien is not prohibited from acquiring and holding lands in the State of Nebraska. It's only a certain kind of land that the statute in which the non-resident alien is restricted in holding, and not prohibited in holding.

Therefore the law of the State of Nebraska as construed by the lower court, which attempts to transfer the title of this land without regard to the rights of the plaintiffs in error, clearly violates the 14th Amendment of the Constitution of the United States.

THE ACT IN QUESTION VIOLATES SECTION 15, ARTICLE 3, OF THE CONSTITUTION OF NEBRASKA OF 1875, WHICH IS IN PART AS FOLLOWS: "THE LEGISLATURE SHALL NOT PASS ANY LOCAL OR SPECIAL LAWS IN ANY OF THE FOLLOWING CASES, THAT IS TO SAY, 'CHANGING THE LAW OF DESCENT."

What we have said above in our discussion of the invalidity of this law under the 14th Amendment, applies equally to the provision of the Constitution in the State of Nebraska. We are unable to find any authorities by the State Court, which directly pass upon this statement as applicable to this provision

of the constitution. It is, therefore, one of first impression in this court, and we believe, is special in several respects.

First. That it is special in that all aliens, non-resident as well as resident, inherit certain classes of property.

Second. That it excludes a part of the non-resident aliens from inheriting a certain class or classes of property, namely, agricultural lands and mineral property.

Third. That in view of the treaties with the United States, certain classes of non-resident aliens can inherit all kinds of property and if upheld, certain classes of aliens cannot inherit but a limited class of property.

Fourth. That it is an attempt to amend the general law of descent for a special and limited purpose.

There is no question but that all non-resident aliens, of those countries, which have treaties with the United States, can inherit property of their ancestors, and we assume that the argument of defendants may be that this provision applies to those countries where there are no treaties, but if so, it is clearly special and violates the provision of the constitution of the state. It is clear to our minds that the law violates that provision of the Constitution of the State of Nebraska.

It is a special law, there is a general law of descent, both as to real and personal estate. (See laws of 1861 above quoted.) And this act attempts to change that law.

The law excludes certain class of people and a certain class of property from its provisions.

Connolly v. *Union Stove Pipe Co.*, 184 U. S. 540.

This statutes violates the provision of section 25, article 1, of the Constitution of the State of Nebraska, 1875, which is:

> "No distinction shall ever be made by law between the resident aliens and citizens in reference to the possession, enjoyment or descent of property."

Referring to the above section of the constitution, it forbids the legislature to make any distinction between citizen and resident aliens with respect to property rights. According to section 1 of the statute of 1889 read literally, a resident alien can, and a citizen cannot, devise his lands to a non-resident.

This appears from a fair reading of the statute itself. The first part of the statute has a broad application and prohibits non-resident aliens from acquiring title to real estate. But if non-resident aliens are prohibited from acquiring title, clearly any devise that a citizen may make to such heirs would be void and hence the effect of this part of the statute is to prohibit a citizen from devising his land to non-resident aliens. The statute, however, goes on to make an exception to this broad rule and does not include citizens within the exception, which is exclusively in favor of the "widow and heirs of aliens." Therefore the prohibition that citizens cannot devise lands to non-resident aliens is prevented by the second part of the statute from operating

against resident aliens, and a clear distinction is made between citizens and resident aliens.

That the statute does make this distinction appears also from the construction placed upon a statute by the Supreme Court of Illinois, *Wunderle* v. *Wunderle*, 144 Ill. 40, 33 N. E. 195, which, so far as the part in question is concerned, is verbatim the same as the Nebraska statute. That Illinois law is as follows:

> "Be it enacted that a non-resident alien, firm of aliens, or corporation incorporated under the laws of any foreign country shall not be capable of acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, except that the heirs of aliens who have heretofore acquired lands in this state, under the laws thereof, and the heirs of aliens, who may acquire lands under the provisions of this act, may take such lands by devise or descent, and hold the same for a space of three years, and no longer."

The court in construing this statute remarks:

> "It is urged that the Act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1, to the *alien heirs of citizens*, as well as to the heirs of aliens; in other words, we are asked to so construe the exception as to give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years, so as to make sale, or acquire an actual residence in the state. This would involve the insertion of the words 'and the alien heirs of citizens' after the words 'except that the heirs of aliens.' By such a construction we would make the legislature say what it had not said. It is not the province of the judiciary to

make laws, but to construe and interpret them, and pass upon their validity. * * * But here the legislature has expressly declared that the heirs of certain aliens shall take and hold lands for limited periods, subject to the privilege of avoiding their escheat to the state by a sale of them, or by acquiring an actual residence in the state, within said periods. But the Act of 1887 nowhere declares, nor is there anything on its face to indicate, that the legislature intended thereby to declare that the non-resident alien kindred of citizens should so take and hold lands for certain periods. The evident design of the legislature was to prevent the accumulation of landed estates in the hands of non-resident aliens. The latter are permitted to acquire and hold personal property in the same manner, and to the same extent as natural-born citizens. The act holds out inducements to resident aliens to become citizens by granting them the privilege of acquiring lands and retaining them for certain periods after declaring their intentions to become citizens, and by providing for escheats to the state in case of failure to sell or to acquire citizenship within such period. We cannot say that the failure to provide for the non-resident alien kindred of citizens may not have been in pursuance of the general design to encourage the naturalization of resident aliens, and to discourage the ownership of land by non-resident aliens. *Non constat* that it was not the intention of the legislature to induce citizens to devise their lands to their resident kindred, or, in case of intestacy, to transmit them to heirs living in this country. We are of the opinion that the exception in section 1 should not be so construed as to embrace others that the class of persons therein specifically designated."

It appears therefore from a fair construction of the statute and from the reasoning and the decision of the Supreme Court of Illinois that the Nebraska legislature has in this section of the statute made a distinction between citizens and resident aliens, and this section therefore cannot stand in the face of the constitutional prohibition.

It may be true that the *Wunderle* case sustains defendants in some of the positions which they take. It must be noted, however, that there is a very wide difference between the statute the court was there construing and the statute in question, and between the conditions and circumstances surrounding the application of the law in the case at bar.

First. The constitution of Illinois contained no limitation like the constitution of Nebraska, prohibiting any distinction by law between resident aliens and citizens.

Second. The statute of Illinois under consideration in that case was based on alienage, not nonresidence.

Third. It applies to all lands and real estate within the state, and not to a special class of real estate.

Fourth. It gave to the heirs of aliens who had acquired lands in the state previously thereto and who might thereafter acquire them under the provision of the act, time within which to sell and dispose of the property.

Fifth. It provides for aliens acquiring and holding personal property to the same extent as natural

born citizens, and for the distribution thereof, when dying intestate, in the same manner.

Sixth. It was entitled "An act in regard to aliens, and to restrict their right to acquire and hold real estate and personal estate, and to provide for the disposition of the lands now owned by non-resident aliens," and the act was in furtherance of the title. The act in that case was quite different from the act here. There is no treaty involved in that case. In that case, section 1 of the act permitted heirs of aliens who had acquired lands in the state before the passage of the act and heirs of aliens who might acquire lands, to take such lands by devise or descent and hold them for a certain period, subject to their escheat.

It may perhaps occur to counsel for defendants in error that, granting that the statute of Nebraska does make the distinction forbidden by the Illinois constitution, yet such distinction arises entirely by means of the clause of exception, and therefore, although this clause may be unconstitutional, that fact would not invalidate the whole section. We contend, however, that the whole section is tainted with the forbidden vice, and should fall. There are, indeed, two parts to the statute, the prohibitive part and the part granting special privilege. In the light of the elucidation made above by ourselves, and in accordance with the construction of the language made by the Illinois court, the statute, stripped of the clauses immaterial to the present issue, may be thus re-stated: Resident aliens can, and citizens cannot, devise their lands to non-resident alien heirs. Now, in order to give rise to the

forbidden distinction, every word in this entire statement is necessary. If the legislature had said "Resident aliens can not devise their lands to non-resident alien heirs" there would then be no distinction between citizens and resident aliens, except in so far as the other part, the prohibitive part, would be implied; but the legislature has not left the prohibition to implication; it has given definite expression both to the grant and to the prohibition. Now, the grant without the prohibition, either expressed or implied, could not make a distinction; and the same is true of the prohibition without the grant. Therefore, in so far, as these two, the express prohibition and the express grant, contribute to create the distinction forbidden by the constitution, they must stand or fall together.

The statute may be viewed from another standpoint, and it will wear the same appearance. Under the general laws of descent, land descends irrespective of the citizenship or residence of the heirs. Now then, suppose we view the two parts of this statute separately from each other, and with reference to the general law of descent.

The two parts of the statute, so far as they are material here, may be stated thus: Every person, including citizens and aliens alike, are prohibited from devising land to non-resident aliens; and the second part may be stated: resident aliens may devise their lands to non-resident alien heirs for a period of ten years.

Consider now the second part with reference to the general law. It is true that, disregarding the first part and considering the second part solely

with reference to the general law, this second part does make a distinction between citizens and resident aliens, in so much as under the general law a citizen could devise his land for an unlimited tenure whereas this second part would restrict the operation of the general law so that aliens could not devise their lands to non-resident aliens for more than ten years. But this is not the distinction of which we complain. The distinction to which we object on constitutional grounds, is one which discriminates against citizens in favor of resident aliens.

Considering the second part, then, aside from the above mentioned immaterial distinction, and construing it with reference to the general law, it is merely a re-enactment of the same thing, granting to the resident alien a privilege which he already possessed under the general law, a privilege also possessed by citizens. It is clear, therefore, that without the aid of the first part of the statute the language of the second part will not, in view of our general law, bear a construction making a distinction which discriminates against citizens.

Consider now the first part, without reference to the second part. It requires no discussion to make plain the fact that this is a universal prohibition and prevents both citizens and resident aliens alike from devising their lands to non-resident aliens. It may therefore be said with still greater force that, without the aid of the second part, the language of the first part will not bear a construction making a distinction which discriminates against citizens.

We reach the conclusion, therefore, that it is only by construing together the two parts of this statute, that the forbidden distinction can be made to appear, and construing them in this way the statute grants a privilege to resident aliens whih it denies to citizens. The vice, therefore, attaches to the whole section, and the same is unconstitutional.

Much that we have heretofore said in our discussion, applies to the provision of the State Constitution, and there is no occasion for us to say anything further upon that point. Undoubtedly counsel for defendant in error will refer to the cases *Dougherty* v. *Kubet*, 67 Neb. 269, and *Glynn* v. *Glynn*, 62 Neb. 872, holding this act in substance constitutional. The case of *Dougherty* v. *Kubet*, 67 Neb. 269 merely holds that the title of the act in question does not conflict with the construction which the court put upon the act in *Glynn* v. *Glynn*, and that it was not violating section 15, article 3 of the Constitution of the state, in that it operated only on lands within the corporate limits of cities and villages and in *Glynn* v. *Glynn*, 62 Neb. 872, the question involved was whether non-resident alien heirs took title to real estate within the corporate limits of cities and towns, and it was held that they did. There is nothing in those two decisions inimical to our position in this case.

This statute violates section 25, article 1, of the Constitution of Nebraska of 1875, as well as the 14th Amendment of the Constitution of the United States, and section 2, article 6, of the Constitution of the United States and the treaties thereof.

WE MIGHT ADD TO THIS ARGUMENT THAT IF THE COMPLAINANTS UNDER THE STATUTES CAN NOT INHERIT, THERE IS ABSOLUTELY NOTHING TO WARRANT THE DEFENDANTS IN TAKING THEIR TITLE THROUGH THE HEIRS OF MARY ANN PLOWMAN.

If the plaintiffs can not inherit this land, then the grantors of defendants have no inheritable blood.

John Toop was born in England, of English parents; two sisters and a brother lived to maturity; they were all born in England of English parents.

If the complainants, because aliens and having to trace their right to inheritance through alien ancestors, the heirs of Mary Ann Plowman, who have to trace their right to inherit through the father and mother who were aliens and died as aliens can not inherit, and therefore, defendants take no title.

The purpose of making this suggestion is to show that the defendants have no better rights than the complainants; that they either all take this title by descent or none of them take. It is our belief that all take, but if none take, then it is clear that if proper action is taken by the county attorney, the land must be forfeited to the state and the proceeds distributed.

In the case of *Lessees of Levy* v. *M'Cartee*, 31 U. S. Supreme Court reports, at page 102, which was a case involving the right of taking real estate by descent under the laws of the State of New York,

and in this case defines what is mediate and immediate descent. On page 111, it is said:

> "In order to clear the way for a more exact consideration of the subject, it may be proper to take notice of some few distinctions in regard to descents, which are of frequent occurrence in the authorities. Descents are, as is well known, of two sorts: *lineal, as from father or grandfather to son or grandson, and collateral, as from brother to brother, and cousin to cousin, &c.* They are also distinguished into mediate and immediate descents. But, here, the terms are susceptible of different interpretations; which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses. A descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate of right; or it may be said to be mediate or immediate in regard to the mediateness and immediateness of the pedigree, or degress of consanguinity."

Again in the opinion on page 112 and 113, it is said by Lord Coke, in his First Institute, Co. Litt. 8, a:

> "*If an alien cometh into England and hath issue two sons, these two sons are indigenae, subjects born, because they are born within the realm; and yet if one of them purchase lands in fee and dieth without issue, his brother shall not be his heir, for there was never any inheritable blood between the father and them; and where the sons, by no possibility, can be heirs to the father, the one of them shall not be heir to the other.*"

The language above applies to the case at bar. Under the authority in that case, it is clear that if

complainants cannot inherit, the defendants cannot inherit.

And further in the opinion, on page 120, the court said:

> "Here, the disability to inherit and make title is plainly stated to exist, not that there is a doubt upon the subject; and the disability is stated to arise from the fact, that the ancestor by whom they are to derive the descent is an alien, not that the ancestor from whom they derive their title to the estate is an alien; and a remedy is therefore provided to meet that which was deemed the only inconvenience, a descent through a mediate alien ancestor. * * * But there is a very recent decision in the State of New York, not yet in print, which is direct to the point now before us. It is the case of *Jackson* v. *Green*, decided by the Supreme Court of that state in 1831. We have been favored with a manuscript copy of the opinion delivered by the court on that occasion. *The question in that case was, whether one naturalized citizen could take by descent from another naturalized citizen, who was his cousin;* the pedigree being to be made through alien ancestors. It was held that he could not. The court fully recognized the distinction already adverted to between mediate and immediate descents, holding that an alien ancestor, through whom the pedigree must be traced, intercepted the descent, and produced a fatal bar to the recovery."

In the case of *Johnson* v. *Olson et al.*, 142 Pacific, 256, the law of Kansas was involved. The point in that case was whether the child of a deceased sister, the sister being an alien, and the child a subject of the United States, could inherit. It seems that the deceased, who died intestate, was the owner of land

in Kansas. He had no wife, no issue, no father, no mother, they having previously died. Among his surviving brothers and sisters some were aliens and some citizens of the United States. One of his sisters who was an alien and living when he died, had two children who were citizens of the United States. It was held that the sister being an alien could not inherit a share in the estate, and that after her death, her children, although citizens, were incapable of inheriting through her.

In the case of *In re Miner's Estate,* 76 Pacific, 962, it appears that California has a provision regarding escheats somewhat similar to the provision in Nebraska, and it is held in that case that the state does not come in by way of succession on failure of heirs or next of kin to take an estate of a decedent, but in such event the property, whether real or personal, goes to the state by escheat, and in every such case an action of escheat becomes necessary to vest title in the estate to the state.

In the case of *Hamilton* v. *Brown,* 161 U. S. 256, which was an action to recover land in the County of Fayette, in the State of Texas, and involved the question of whether the land was forfeited to the state or not, the court said, on page 268:

> "But the whole object in proceedings for escheat, as in proceedings of administration, is to ascertain who are entitled to the estate of a deceased person; in proceedings of administration, to distribute the assets, after payment of debts, among those who come forward and prove themselves to be next of kin; in proceedings for escheat, to ascertain and determine, once for all, so far as concerns the title in the land itself, whether the former owner left no

> heirs or devisees, that being the single question on which depends the issue whether or not the land has escheated to the state."

To the same effect are the cases of *Blythe* v. *Hinckley,* 180 U. S. 333, page 341; *McCreery's Lessees* v. *Somerville,* 9 Wheat. 354; *Taylor* v. *Benhan,* 5 How. 232.

The case of *Butschkowski* v. *Brecks et al.,* 143 N. W. 923, was a bill for partition. The plaintiff was an alien a citizen of Prussia; the defendant a citizen of the State of Nebraska. A judgment was entered on the pleadings in favor of the defendant. The Supreme Court reversed on the ground that the non-resident alien could inherit under a treaty with Prussia. After the plaintiff's death, her husband was allowed to be substituted and the cause continued.

In the case of *Erickson* v. *Carlson et al.,* 145 N. W. 352, the Supreme Court of Nebraska; was an action to quiet title. It was brought by a resident against non-resident aliens. The question of the right of these non-resident aliens under the treaty with Sweden was involved, and the construction of that treaty, whether it included real estate, and the court held that it did include real estate, and in effect that the non-resident alien could inherit.

Therefore our conclusion that if complainants cannot inherit, defendants acquire no title, because they have to trace their right to hold the land in question through non-resident aliens.

We are merely suggesting this point, for the reason that defendants claim the entire real estate by

purchase of one-third thereof through residents of the United States, and who represent one-third of the heirs of John Toop. As the heirs of Mary Ann Plowman, or her children have to trace their ancestry through the father of John Toop, may have no inheritable blood at common law, they stand in no better position than the plaintiffs.

Plaintiffs in error and the grantors of defendants in error either all take or they do not any of them take. The land must either descend to them all or it is subject to be forfeited by the state and the proceeds distributed to all.

IF THE ACT IS TO BE HELD CONSTITUTIONAL, THEN WHAT SHOULD BE THE RULE OF INTERPRETATION?

The question for the court to determine is, what was the intention of the legislature of Nebraska when it passed the alien statute? The intention is the law. To determine that intention we must take into consideration all the sections and parts of the act in question, give consideration to the title, consider the constitution of the United States and the state and the statutes in force at the time this statute was passed. Then, as to this case, take into consideration, also, therewith the treaty between Great Britain and the United States.

In Lewis' Sutherland Statutory Constitution, Vol. 2, Sec. 363, it is said:

> "If a statute is valid it is to have effect according to the *purpose* and *intent* of the lawmaker. The *intent* is the vital part, the essence of the law and the primary rule of construction is to ascertain and give effect to that *intent*. The *intention* of the legislature in enacting a law is the law itself, and must be enforced when

ascertained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute when it leads away from the true *intent* and *purpose* of the legislature and to questions inconsistent with the general purpose of the act. *Intent* is the spirit which gives life to a legislature enactment. In construing statutes the proper course is to start out and follow the true *intent* of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

In support of this test a great many authorities are cited.

The same author, in Vol. 2, Sec. 370, says:

"Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute. No clearer statement has been or can be made of the law as to the dominating influence of the *intention* of a statute in the construction of all its parts than that which is found in 'Kent's Commentaries.' In the exposition of a statute the *intention* of the lawmaker will prevail over the strict letter. When the words are not explicit the *intention* is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the *intention* is to be taken or presumed according to what is consonant with reason and good discretion."

The same author again, at Sec. 347, says:

"It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words

may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such *intention.*"

What was the intent of the legislature of Nebraska when it passed this act? Was it to restrict or to prohibit? In determining this question the following must be kept in mind:

1st. That the policy of the State of Nebraska from its organization as a territory up until the year 1887, had been to grant equal rights to all persons, aliens, citizens, residents or non-residents, corporations or otherwise, with reference to acquiring, holding and conveying real estate.

2nd. That by the constitution of the State of Nebraska (section 25, article 1) "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." The common law disability of alienage is thus eliminated and no law can be passed based upon any distinction between citizens and aliens.

3rd. The general laws of descent of the state, in force at that time, which do not purport to be by this act amended or repealed and could not be, in view of section 15, article 3 of the constitution. providing that "the legislature shall not pass local or special laws in any of the following cases, that is to say * * * changing the law of descent * * *." Since the adoption of the constitution of 1875 the law of descent can only be changed in one of two ways, either by repealing the entire act and adopting a new one in its place, or by a constitutional amendment to the act itself. It cannot be done by a separate act covering a special right out of a general law.

4th. Section 2, article 6, of the Constitution of the United States: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

5th. The Hay-Pauncefort Treaty of 1900 between the United States and Great Britain, giving to British subjects not entitled to hold title to real estate by the laws of any state, the right to the proceeds from the sale thereof and time within which to sell and dispose of such real estate.

6th. The Fourteenth Amendment to the Constitution of the United States which provides among other things, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7th. Section 54 of chapter 73 of the Compiled Laws of Nebraska, entitled "Real Estate," as it existed prior to 1887, being section 62 of chapter 31 of the laws of 1855 and 1856. Chapters 62 and 65 of the laws of 1887 hereinbefore quoted, the subject-matter of which is covered by the present act, repealing those acts. Chapter 62 became section 54 and chapter 65 became sections 63 and 64 of chapter 73, entitled, "Real Estate," of the Compiled Laws of Nebraska of 1887.

Taking all these matters into consideration, together with the entire act itself, including its title, what did the legislature *intend* to do? We contend that the legislature *intended* to do the only thing

it had power to do, namely, pass a law *restricting* the right of *non-resident aliens* holding title to certain real estate. It might have included within its purview all real estate. It did not do so. The subject-matter of the act is the holding of title to certain lands. The basis of its action is *non-residence*, not *alienage*. The only figure that alienage cuts in this legislation is to divide non-residents into two classes, namely, those who are citizens of other states of the United States and those who are not citizens of the United States.

On account of the prohibition of the Federal Constitution, the legislature could not deprive citizens of the United States from holding title to real estate in Nebraska, though not residents of that state. The legislature could not by reason of the Nebraska constitution make any distinction between resident aliens and citizens. The only class of persons, therefore, that it did have power to *restrict* was non-resident aliens. Is not that exactly what the legislature has intended and attempted to do?

The act is entitled, "An Act restricting non-resident aliens and corporations not incorporated under the laws of Nebraska in their right to acquire and hold real estate, etc." It is an act restricting not prohibiting. The "right to acquire and hold" is restricted. The "right to acquire" is not denied nor prohibited. Neither is the right to hold; nor the right to acquire and hold. The right to acquire and hold is, however, restricted. The word "restrict" is defined in the Century Dictionary, "to prevent (a person or thing) from passing a certain limit in any kind of action; limit; restrain," while

the word "prohibit" is defined in the Century Dictionary, "1. to forbid; to interdict by authority; as, to prohibit a person from doing a thing; to prevent the doing of a thing. 2. To hinder; debar; prevent; preclude."

When the legislature, therefore, passed an act "restricting" their right, it did not and could not under that title intend to deprive non-residents from acquiring and holding real estate. It did not thereby intend to amend or repeal the general statutes of descent as applied to non-resident aliens, but it did intend to limit the right of non-resident aliens to hold real estate; not all real estate but certain real estate. It did not thereby intend to change the laws of descent. Its purpose was to confine the holding of farm lands to actual residents of Nebraska, not to deprive any heir of his share of his ancestor's estate. The act was aimed directly at the title to real estate, who should hold it. Not corporations organized outside of Nebraska, not aliens residing outside of Nebraska, but residents of Nebraska only, except in so far as the legislature was compelled by virtue of the limitations of the Federal Constitution from depriving non-residents of Nebraska who were citizens of the United States, from holding title.

Section 1 of the act provides:

> "Non-resident aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to, or taking or holding, any lands or real estate in this state, by descent, devise, purchase or otherwise, only as hereinafter provided."

"Non-resident aliens * * * are hereby prohibited * * * only as hereinafter provided" taken into connection with the title does not mean that non-resident aliens cannot inherit; it does not mean that it was intended thereby to change the law of inheritance as to real estate. "Except the widow and heirs of aliens" to be consistent with and within the provisions of the constitution must read, "Except the non-resident alien widow and non-resident alien heirs of non-resident aliens, who have heretofore acquired lands in this state under the laws thereof" shall have ten years to either become residents or dispose of the land.

To read that statute literally, something must be supplied in order to make the statute apply to the title of the act and constitution. If we read it "Except the widow and heirs of aliens, who have heretofore acquired lands in the state under the laws thereof," then we are giving to all classes of aliens a privilege and creating the right of inheritance to a class of people which is denied to a citizen. This cannot be a fair construction of the statute.

To illustrate, if John Toop had been a non-resident alien instead of a naturalized citizen it would be conceded that the plaintiffs would take, as heirs, and would have a right to hold for ten years. By the letter of the act this would be true ever were he a resident alien, as the language is "the widow and heirs of aliens," but because be became a naturalized citizen it is contended that the law of inheritance as to real estate has been changed as to him.

To illustrate further, suppose John Toop had left only the plaintiffs in error as his heirs and next of kin, all non-resident aliens.

What would have become of the title to this real estate? Plaintiffs in error contend they would have taken it. The only position that can be taken consistently is that in that case it would escheat to the state for want of heirs, but it will be noted by reference to the statute of descent that it is only when "the deceased shall leave no kindred, nor husband, nor wife" that the estate shall escheat.

There is nowhere in the statute of descent that if John Toop had died leaving two children, one an alien and another a citizen, that the alien could not inherit. It is by referring to the chapter entitled "Real Estate" that they attempt to carve out of the law of descent the right of an alien to inherit real estate. The statute does not carve it out, but gives the alien the right to come into the state and accept his inheritance, and on failure to do so before office found, it may be forfeited.

The provision for forfeiture is found in the chapter entitled "Real Estate," being section 71 of chapter 73 of the laws of 1907; that is the only provision which authorizes the proceeding of forfeiture.

Looking at section 2, of the law of 1889, it provides what steps shall be taken to forfeit the land. It starts "Whenever any such lands shall revert and escheat to the State of Nebraska as provided in this act." "Such lands" refer to lands acquired or that may be acquired by non-resident aliens by descent, devise, purchase or otherwise. It further

provides "The heirs or persons who would have been entitled to such lands shall be paid by the State of Nebraska full value thereof" etc. Following that up, section 3 of the act provides that non-resident aliens who have acquired lands at the time the act takes effect may dispose of the same to a purchaser during his lifetime and take security for the purchase money with the same rights as citizens of the United States. That section of the act makes more clear the intent of section 1.

No limitation could be placed upon the resident widow and heirs of aliens (whether resident or non-resident) under the constitution and the only restriction that could be placed upon the widow and heirs of aliens must be the same restriction that could be placed upon the non-resident widow and non-resident alien heirs of citizens of the state. Section 4 makes the intention still more clear, for it provides that non-resident aliens having liens upon real estate may enforce such liens and become the purchasers of the real estate and hold it for ten years. It can hardly be contended that the legislature intended to grant non-resident alien lien holders rights with reference to holding title to real estate that it refused to the non-resident alien heirs of citizens or aliens. Every intendment of the act goes to show that what the legislature intended was to restrict the right of non-resident aliens to hold real estate in Nebraska, to a period of ten years. This is the only construction that can be placed upon the act that would leave it constitutional (even if this does). Such a construction would be grounded upon non-residence, not alienage. It would apply

to farm and mining lands outside of the corporate limits of cities and towns. It would also apply to all non-resident aliens without distinction, whether residents of other states of the United States or not, and whether protected by treaties or not.

It is apparently the purpose of the act to invite non-resident aliens to become resident aliens or citizens in order to retain the title to the lands they accumulate, but if they do not wish to do so it is the intent of the act that their land and interest therein shall be forfeited and the value thereof paid to them. It gives them ten years to either dispose of the land or become resident aliens or citizens. There is nothing in this statute which prohibits these non-resident aliens from being heirs of John Toop under the general statutes of descent. They were and are his heirs. It is not denied but that they were and are his heirs as to personal property, or as to lands and real estate within the corporate limits of cities or towns. They are therefore qualified as heirs to take by descent. The only question is, can they hold the particular real estate in question? In any event they could not do so prior to the death of the widow. She died in 1907. At that time there was in force a treaty with Great Britain which went into effect August 6, 1900.

At the time of John Toop's death, there was in force, in the State of Nebraska, the act of January 11, 1861, regarding descent above quoted.

It may be contended by counsel for defendants in error, that if these heirs take at all, they take under the 5th clause of the statute of 1861, basing their

contention in the case in Nebraska of *Douglas* v. *Cameron,* 47 Neb. 358. But an examination of that case would disclose the fact that the court there brought the case directly within the 5th clause above quoted. In that case there was no widow.

In the case at bar the 5th clause has no application, because John Toop died living a widow. The Act of 1855 and 1856, section 174 and 175, provides for a case of an intestate dying leaving a widow and no issue.

That act, however, is probably repealed by section 14 of the Act of 1861, which provides that all acts and parts of acts inconsistent with this act are hereby repealed.

By the Act of 1861, the whole estate is given to the widow for her life, under paragraph 2, section 1, chapter 2. It makes no provision what shall become of the property at her death, unless his father survives the widow.

Therefore when John Toop died in 1897, leaving a widow, and no children, father, mother, brother or sister, his estate, according to the language of the statute, descended to his wife, Sarah J. Toop, for her life, and at her death, to his nephews and nieces, the children of his brother William Toop, and his two sisters, Mary Ann Plowman and Betsey Orchard, in the propositions specified in plaintiff's petition.

Again we refer to sections 1, 2, 3 and 4 of the law of descent. It is apparent that the widow does not take any life estate if there are children; that the father does not take anything until the death

of the widow; that the brothers and sisters are collateral and take nothing if there is either children, widow or father.

It will be noted that in these general statutes of descent there is no restriction or limitation on account of alienage or non-residence. It is only when "the deceased shall leave no kindred, nor husband, nor wife, the estate shall escheat to the State of Nebraska, paragraph 9, section 1, Laws of 1861."

In 1889 there was an attempt to charge the law of descent, but that law was declared unconstitutional, *Turnbull* v. *Turnbull,* 37 Neb. 340, *Flanders* v. *Bedell,* 58 Neb. 57.

At the common law, it is admitted, aliens could not inherit. They had no inheritable blood. The rule of the common law, however, has never been in force in Nebraska. By section 14, article 1 of the Constitution of 1866, the same provision of the Constitution of 1875, section 25, article 1, it was provided that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." The common law disability of alienage is therefore removed by the Constitution so far as inheriting real estate in Nebraska is concerned.

Judge Munger in the case of *Bahuad* v. *Bize,* 105 Fed. 485, says there is no distinction between citizens and aliens on account of alienage. He says:

> "Hence it is clear that Nebraska is one of the states of the Union which authorizes aliens to hold real estate."

The general laws of descent of Nebraska make no distinction between residents and non-residents, whether citizens or aliens. So far as the general laws of descent of the State of Nebraska are concerned non-resident aliens, non-resident citizens (by which we mean citizens of the United States not residing in Nebraska), resident aliens and citizens, are all placed in the same class.

In 1887, on March 31st, the legislature passed two acts which were afterwards repealed by the act in question in this case. They were undoubtedly repealed because unconstitutional.

The title to chapter 62 of the Act of 1887, is an act to prohibit non-resident aliens from acquiring or holding real estate in the State of Nebraska, and to amend section 54 of chapter 73 of the Compiled Statutes of Nebraska entitled "Real Estate," and repeal said original section. (Statute hereinbefore quoted.)

Had that statute been the only one passed and remained in force, it might well be contended that it was the intention of the legislature to absolutely change the policy that had previously obtained in Nebraska, and from that time forth prohibit non-resident aliens from acquiring or holding any real estate in the State of Nebraska. But that act was changed and modified by another act passed on the same day and approved at the same time and constituting a part thereof, namely chapter 65 above referred to; the title of which is "An Act to prevent the acquiring of title to lands in the State of Nebraska, or the descent thereof to non-resident aliens, to provide for the escheating thereof on the

death of the owner to the State of Nebraska, and for the payment to be made thereof, and for the disposing thereof." An analysis of that title, as applied to lands which would otherwise descend to non-resident aliens, would seem to provide for escheat and payment for the non-resident heirs. The act applies to all real estate, except such as is necessary for the construction and operation of railroads. It discriminates, however, between classes of non-residents, so that it is absolutely contradictory to chapter 62, passed at the same time. Chapter 62 applies to all non-resident aliens, while chapter 65 applies to only non-resident aliens who have not declared their intention to become citizens of the United States.

That these two acts are unconstitutional is probably unquestioned, but whether or not, the legislature of 1889 was not satisfied, and, therefore, repealed them and enacted the law in this case.

The question before this court now is, if these acts are unconstitutional, what is the proper construction to be given to the Act of 1889, as applied to the facts in this case?

We contend on behalf of the plaintiffs in error, that the court must construe the act as restricting non-resident aliens in their right to acquire and hold real estate, for a period of ten years, as applied to farm lands and mining property, and not as prohibiting them from acquiring or holding. That to so construe the act as to prohibit the plaintiffs from the holding and taking in this case, would be to render it unconstitutional, as we have heretofore suggested, in violation of the Federal Constitution, but

a violation of the State Constitution. Therefore, we insist the court must either hold that the act is merely restrictive or that it is unconstitutional.

In this case, the maxim, "*noscitur a sociis,*" undoubtedly applies. Lewis on Statutory Construction, Vol. 2, section 414, says:

> "Not only are words and provisions modified to harmonize with the leading and controling purpose or intention of an act, but also by comparison of one subordinate part with another; that is to say, the sense of particular words or phrases may be greatly influenced by the context, or their association with other words and clauses. The principle is embodied in the maxim, *noscitur a sociis,* and is applicable to the construction of all written instruments. When two or more words are grouped together, and have ordinarily a similar meaning, but are not equally comprehensive, they will qualify each other when associated; they may import a conventional sense and have great scope when so used without restriction in the context, and they may be capable of widely different applications when specialized by accompanying provisions expressive of a particular intention or limited application."

The object of the act in question was that non-resident aliens be restricted in their right to hold real estate. Such was the aim from the title of the act. The right to take title or hold real estate either by devise, descent or purchase is not prohibited. Alienage is not the disqualifying element in the statute because the constitution provides that resident aliens have the same rights as citizens. Non-resident alienage is not the disqualifying element in the statute, because, notwithstanding the statute, treaties of the United States confer upon many non-resident

aliens the right to hold real estate for limited periods. Neither is alienage, or non-resident alienage, or non-residence, the disqualifying feature in the statute, for the reason that the statute does provide that the widow and heirs of non-resident aliens may take for a limited period, or indefinitely, if they become residents, not necessarily citizens; that a legal holder of a mortgage may acquire title to real estate, hold it for a limited period, and probably indefinitely, if he becomes a citizen; that a non-resident alien heir of a citizen or alien would inherit real property so long as it is used for railroad purposes, or so long as it was used for manufacturing purposes; that a non-resident alien heir of a citizen or resident would take title to real estate located within the corporate limits of cities and villages. Therefore the only effect that we can see in this statute is to attempt to restrict non-resident aliens from inheriting from citizens or resident aliens, farm or arable lands or mining properties which practically comprehends only agricultural and mining lands outside of those particularly provided for in the statute.

Taking the words "devise," "descent" or "purchase" together, any non-resident alien may therefore acquire from a non-resident alien title to lands for a limited period, title by purchase, or acquired under a lien, for a limited period; title for railroad purposes, for manufacturing purposes, or within the corporate limits of towns or villages. Therefore, if a person acquires title by reason of being an heir to a non-resident alien, by reason of acquiring it by descent, by a mortgagee who has taken

it under a lien, and who has the right to dispose of it for ten years, by taking railroad property by descent from an ancestor, or manufacturing property by descent from an ancestor, or if the land is located within the limits of any town or city, the non-resident alien heir takes title until the object for which he has taken title fails, or he has become a resident of the State of Nebraska, and when the object has failed under which he may take title to land, the state may forfeit the land, and must begin a proceeding in forfeiture. But the state on any of the above grounds cannot begin a proceeding in forfeiture until the limit of time provided for in the statute has expired, or until the object has failed under which an alien may inherit, namely, that the railroad or factory has been abandoned, or the city or town vacated or the ten years has elapsed and the alien not become a resident. So it is, that the words "descent," "devise" and "purchase" being associated, the object of the statute is not, as we have said, that non-resident aliens cannot take title to the land or hold the same, but that they take title to the land by descent, devise or purchase and hold it until the state intercedes to take it away from them, no matter whether it is farm land, mining land, factory land, railroad land, lands in the cities or towns. The object of the statute is forfeiture, forfeiture of the right to hold land, not the forfeiture of the estate to the state. The object of the statute is to require residence in the state, and if residence in the state is not made as provided in the statute, or as employed by the statute, then the non-resident alien heir takes title and holds the land

until the state forfeits the same, and when the same is forfeited, the state pays the value thereof to the person or persons who held title at time of forfeiture.

IF THIS ACT IS TO BE HELD CONSTITUTIONAL, WHAT IS THE FAIR CONSTRUCTION TO BE PLACED UPON IT?

The title of the act is, "An Act restricting non-resident aliens and corporations not incorporated, under the laws of Nebraska in their right to acquire and hold real estate."

The title of the act must necessarily be incorporated within the act, that is to say, the intent of the act, must be gathered largely from the title.

A positive statement that section 1 of the act is clear and unambiguous cannot be made.

The constitution treats resident aliens the same as citizens.

The statement in the first section in the act, "that the widows and heirs of aliens who have heretofore acquired lands in this state, under the laws thereof, may hold such lands by devise or descent, for a period of ten years and no longer, and if at the end of such time herein limited, such land so acquired have not been sold to any bona fide purchaser, and such alien heirs have not become residents of this state, such land shall revert and escheat to the State of Nebraska," is incomplete and imperfect, and the very language of that clause shows its imperfection, for the reason:

First. That the title of the act is to restrict *non-resident* aliens.

Second. The constitution permits resident aliens to hold lands the same as citizens.

Third. That the clause above quoted provides that if such aliens shall not sell the land or *become residents* of the state within ten years, then it shall be forfeited to the state.

Fourth. If a resident alien owns a farm in Nebraska, his children, although aliens if residents, would inherit, and their children, although aliens, would inherit, so long as they became residents of the State of Nebraska, and so on, *ad infinitum*, and each succeeding generation would inherit under the constitution and law of the state just so long as they were residents at the time of their parents' death.

So in order to give that language construction consistent with the title, it must read as follows: "Except that the non-resident widow and non-resident heirs of non-resident aliens who have heretofore acquired lands in this state, under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, etc."

Now, bear in mind the title. It expresses the real intent and purpose of the legislature. The statute, according to the intent of the legislature, should read as follows:

> "Section 1. Non-resident aliens and corporations not incorporated under the laws of the State of Nebraska are hereby restricted (prohibited) from acquiring title to, or taking, or holding any lands or real estate in the state by descent, devise, purchase or otherwise, only as hereinafter provided; provided, however, that the non-resident widow and non-resident heirs of non-resident aliens who have

heretofore acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years, and no longer, and if at the end of such time herein limited, such lands so acquired have not been sold, then they shall be forfeited to the state; provided further, any non-resident alien who owns land in this state at the time this act takes effect, may dispose of the same during his life to a bona fide purchaser for value, and may take security for the purchase price, to the same rights as to security of citizens of the United States; and provided further, that nothing in this act shall prevent a non-resident alien or corporation not organized under the laws of the State of Nebraska, to liens upon real estate, or any interest, whether heretobefore or hereafter acquired from holding or taking a valid title to such real estate, subject to such liens, nor shall it prevent any such alien or corporation from enforcing a lien or judgment for any debt or liability now existing, or which may hereafter be created, nor from becoming a purchaser at a sale made for the purpose of collecting or enforcing the collection of such debt or judgment, but such land so acquired shall be sold within ten years after the title thereto shall be perfected in both non-resident aliens or foreign corporations. Failure, however, to sell such lands, they shall revert and escheat to the state. Provided further, that the provisions of this act shall not apply to the real estate necessary for the construction and operation of railroads; and provided further, that nothing in this act shall be construed to prohibit a non-resident alien or foreign corporation from purchasing or acquiring title to so much real estate as may be necessary for the purpose of erecting and maintaining manufacturing establishments; and provided further, that the provisions of this act shall not apply to any real estate, lying within the corporate

limits of cities and towns. It shall be the duty of the county attorney in the county where such lands are situated to enforce forfeitures of all such lands as are held contrary to the provision of this act."

That is the true intent and meaning of this act. And it is the spirit and intent of the act, that no person shall be deprived of acquiring or holding by devise, descent or purchase, the words being used together, unless the state, by its duly authorized officer, steps in to take the lands and forfeit the right.

If under the first provision, the non-resident widow and non-resident heirs of non-resident aliens do not come within the state, or sell their inheritance within ten years after that time, the state may forfeit it, but not until that time has expired.

Under the second proviso, the security holder has all the rights of a citizen, and as modified by the third proviso, can hold the land after foreclosure and purchase, for ten years, and if at the expiration of that time he has not sold it, it then becomes the duty of the county attorney to forfeit it. So it is under the third proviso, any non-resident alien or corporation may acquire real estate under a lien, or collection of judgment or debt, if at the expiration of the end of the ten years after they have acquired title they have not sold it, then the county attorney must take steps to forfeit it.

If a non-resident alien or corporation acquires railroad lands, and they should not be operated, and the object of which they are acquired shall be abandoned, then after such abandonment, if the non-

resident alien or corporation does not dispose of the land, then the state may forfeit it.

A non-resident alien or corporation may acquire manufacturing property, either within or without the corporate limit of towns or villages, and if the object of the incorporation is abandoned, then, and then only can it be forfeited.

Any non-resident alien or corporation may acquire lands, farms, town lots, manufacturing sites, or any other property within the corporate limits of towns or villages, and hold it indefinitely. However, if the municipal corporation should cease to exist, then, and then only, could it be forfeited to the state.

All lands pass to the heirs by operation of law. They are entitled to hold until office found.

There is no question but that a non-resident purchaser of land or lands are given to a non-resident alien by will, that that land cannot be forfeited to the state without due and legal process, forfeiting the land. The word "devise" being used in connection with the words "descent and purchase" in the section provided for in this act, shall be forfeited to the state by the county attorney, includes the lands inherited, as well as those devised or granted. This is made apparent by the second section. All of what we have said before is made more apparent by the second section of the act, which provides:

> "Whenever any such lands shall revert and escheat to the State of Nebraska, as provided in this act, it shall be the duty of the county attorney in the county in which such lands are

situated, to proceed against such aliens in the District Court of the county where the land is situated, for the purpose of having such forfeiture declared. Service of summons may be had upon the non-resident alien defendants by publication, as provided in the statute of Nebraska, for the service of summons by publication as in cases of foreclosure of mortgages, and the court shall have power to hear and determine the question provided in such cases, and to declare such lands escheated to the state, and when such forfeiture shall be declared, by the District Court, it shall be the duty of the clerk of the court to notify the governor of the state that the title of such lands is vested in the state by the decree of said court, and the clerk of the court shall present the auditor of public accounts with a bill of costs incurred by the county for publication of such cases, who shall issue a warrant to the clerk of the court and the state treasurer to pay the county for such costs incurred. The heirs or persons who would have been entitled to such lands, shall be paid by the State of Nebraska, full value thereof, as ascertained by appraisement, upon the oath of the judge, treasurer and clerk of the county where such lands lie, and such lands shall then become subject to the law and disposed of as other lands of the state, provided that the expense of the appraisement shall be deducted from the appraised value of the land."

What is meant in the second section, where it says, "whenever any such lands shall revert and escheat to the State of Nebraska, as provided in this state"? It surely is not limited, as counsel for defendants in error may contend, to the lands, provided in section 1 in the following language "except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold

such lands by devise or descent for the period of ten years, and no longer." This second section does not limit the county attorney to such lands, but it is to *all lands provided* in the act which are held contrary to the provision of the act, which is lands acquired by a non-resident alien by devise, by inheritance, by purchase; that are held longer than ten years; that are acquired for railroad purposes where the railroad has been abandoned; that are acquired for manufacturing purposes where the manufacture has been abandoned; that have been acquired in cities or towns where the cities or towns have been abandoned.

Again, what is meant by the provision in the act, in the second section, which provides that "service of summons may be had upon the *non-resident alien defendants by publication,* as provided in the statute of Nebraska, for the service of summons by publication as in cases of foreclosure or mortgages." Non-resident aliens who acquire by inheritance, devise, purchase or under any of the provisos above quoted, are the only ones affected by the act, and it is service of summons upon them in the method provided for the service of summons in cases of foreclosure.

A resident alien cannot be involved.

Again, what is meant by the language, "the heirs or persons who would have been entitled to such lands, shall be paid by the State of Nebraska, the full value thereof, as ascertained by appraisement, upon the oaths of the judge, etc." if it is not to convert inheritance by, or devises to, or purchase by non-resident aliens?

Under the laws of descent, a non-resident alien is entitled to all the benefits of personal estate that a resident is. And the real object of the act, is that if the non-resident alien does not wish to become a resident of the State of Nebraska, whether he inherits, whether he acquires by devise or purchase, or any of the provisions above quoted, then it is the purpose of the act to transfer his real estate into personal estate, and let him withdraw the personal property. And unless the state forfeits the right of the non-resident alien, the title vests in the alien by inheritance, by devise, by purchase, until office found.

One more suggestion which may throw some light upon the construction of this act, and that is this: If the legislature of Nebraska had intended to absolutely prohibit non-resident aliens from acquiring title to lands, why did it not entitle its act as follows: "An Act to prohibit non-resident aliens and corporations from acquiring title to real estate"? and then make the act read consistent with the title, or, if the legislature intended to prohibit non-resident aliens from acquiring title to agricultural and farm lands, as is evident, why did it not entitle its act as follows: "An Act to prohibit non-resident aliens and corporations, not incorporated under the laws of Nebraska, from taking title to, or holding agricultural or mineral lands" and then make the act conform with the title?

It does seem as though the act either must be held invalid or unconstitutional, or it must be given a construction which is consistent, namely, that all

aliens take title and can hold real estate until office found.

THAT THE INTEREST OF COMPLAINANTS CAN ONLY BE TAKEN AWAY BY OFFICE FOUND.

The law of Nebraska makes no distinction, and as we have insisted, there is nothing in the law which gives to collateral heirs an exclusive right to the property as against other heirs of equal degree, who are non-residents and aliens. The non-resident aliens do take and do inherit unless the state takes that inheritance away by reason of the failure to comply with the statute. The state, and the state only, is the one that can interfere. This is recognized by the Supreme Court of Nebraska.

The Supreme Court of the State of Nebraska recognizes that the state under similar statutes, must exercise the right of forfeiture decided some time ago in the case of *Carlow* v. *C. Aultman & Co.*, 28 Neb. 672, 44 N. E. 874. Aultman & Co. had acquired title to some land under a judgment sale. An attempt was made to set aside the judgment and sale on the ground that Aultman & Co., a foreign corporation, were prohibited from holding land. It was not an action by the state.

The act in force at that time, provided

> "that no non-resident alien foreigner, who has not declared his intentions to become a citizen of the United States, nor any corporation, or association, not incroporated under the laws of this state, shall acquire or own, hold or possess any right, title or descent, accruing hereafter, any real estate in the State of Nebraska."

Plaintiff in error can not take advantage of this statute. The title of C. Aultman & Co. is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose.

Bank v. *Mathews,* 98 U. S. 621.

And we only have to refer to the cases above quoted, entitled *Pembrook* v. *Huston,* 79 S. W. Rep. 470; *Osterman* v. *Baldwin,* 73 U. S. 116; *Manual* v. *Wolf,* 152 U. S. 505; *Fairfax* v. *Hunter,* 7 Cranch, 603; *Jackson* v. *Adams,* 7 Wendell, N. Y. 368.

THAT THE WIDOW HAS THE ABSOLUTE ENJOYMENT OF THE ESTATE WITHOUT INTERFERENCE DURING HER LIFE.

In the case of *Alexander* v. *Alexander,* ~~cited~~ by the Supreme Court of Nebraska, 26 Neb. 673, 41 N. W. Rep. 1065, is a petition for partition. Alexander died in 1885, and left a widow; also a brother John, residing in Dixon county, Nebraska; Ellen, a sister, residing in New Zealand, James E. and Maggie E., niece and nephew, residing in Dixon county, and Robert Alexander, since deceased, John Alexander and Ellen Smith, as heirs, having the right to partition, claiming a two-thirds interest in the land, and the nephews and nieces the other third. Partition was denied, and the court say,

> "if the widow has any life estate in the lands mentioned, the plaintiffs cannot maintain an action of partition against her. She is entitled to the full possession and absolute control during her life in said estate, provided she does not commit waste thereon, and the plaintiffs would have no right to disturb her possession." Partition was denied.

JURISDICTION OF THIS COURT.

Possibly defendants in error may desire to raise the question of the jurisdiction of this court. It is our understanding that under section 238 of the Judiciary Act, which took effect January 1, 1912, an appeal lies directly to this court.

The Constitution of the United States, and upon this appeal, this court hears and determines the whole case, as in the case of *Loeb* v. *Columbian Township Trustees*, 179 U. S. 472, and quoting from *Holder* v. *Aultman*, 169 U. S. 81, 88, the court said:

> "That was an action in the Circuit Court of the United States for the Eastern District of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a Federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: 'The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that state under the contract, was in conflict with the Constitution of the United States, authorizing congress to regulate interstate commerce.' This was therefore a 'case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3, 1891. Upon such writ of error, differing in those respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right

> claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case."

To the same effect is the *Home Life Ins. Co.* v. *Fisher,* 188 U. S. 727, and *Fidelity Mutual Life Ins. Co.* v. *Mettler,* 185 U. S. 309.

THE TRIAL COURT MISCONCEIVED THE EFFECT OF THE STATUTE.

It seems to us that the trial judge passing upon only one or two of the points raised (sufficient possibility in his opinion to justify his judgment), misconceived the intent of the statute, record page 16, where he says:

> "There is no prohibition of the right of resident aliens to acquire lands mentioned in the statute, but there is a grant to the right and acquisition of non-resident aliens from aliens."

In other words, there is a prohibition directly against non-resident aliens with an exception in favor of non-resident heirs or devisees of aliens, then owning lands.

We can not believe from the title of the act, from the constitution of the state, from the language of the act itself, that that is the intent of the act.

Again he says:

> "A resident alien may also acquire title to such property by inheritance or devise from aliens, who owned the same before the passage of this act, because there is no statute denying such right."

In that statement he implies that subsequently to the passage of the act in question, a resident alien could not inherit from a resident alien. Under the constitution, resident aliens have all the rights of citizens.

We believe the trial court was wrong in the statement thus made, and an exception of the law.

A Review of a Few of the Decisions of the State of Nebraska.

The principle of equality runs through all the constitutions, federal and state. It is the principle of treating everyone similarly situated, alike.

In the case of *State ex rel. Wheeler et al.* v. *Stuht*, 71 N. W. 941, Mr. Justice Harrison, in delivering the opinion of the Supreme Court of Nebraska said:

> "In an examination into the character of an act of the legislature, to ascertain whether it is general or otherwise, the determination of the question must depend on the substance of the act, not its form. That the act contains expressions which might stamp it as general will not give it such character. Nor will expressions or terms which might lead to a belief that it is special make it so. The substance alone must give character to the act."

What is the substance of the act in question? It is that certain specified non-resident aliens may not take and hold title to certain specified real estate. The substance of the act shows it to be special, both in the class of persons to which it is applicable and in the property to which it applies.

See also:

Trumble v. *Trumble*, 55 N. W. 869;
State v. *Tibbetts*, 71 N. W. 990;
Webster v. *City of Hastings*, 81 N. W. 510;
construing various constitutional questions.

In *State* v. *Farmers & Merchants Irrigation Company*, 80 N. W. 52, the Supreme Court of Nebraska held an act which exempted irrigation companies from the operation of a general law requiring rail road corporations and canal companies to erect and maintain bridges and crossings on the highways where their roads, canals or ditches crossed such highways, is special legislation and therefore unconstitutional and void.

As Mr. Justice Sullivan in delivering the opinion of the court said:

> "The rule established by the authorities is that, while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. Cooley, Const. Lim. (5th Ed.) 481. In *Long Branch* v. *Sloane*, 49 N. J. Law, 356, 8 Atl. 101, the court, after remarking that the character of a law is to be determined from a consideration of its purpose and the objects upon which it is intended to operate, said: 'If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a

> class by themselves, and legislation affecting such a class to be general. But if the characteristics used to distinguish the objects to which the legislation applies from others are not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification would be incomplete and faulty, and the legislation not general, but local or special.' "

The law in question is grounded on *non-residence.* Its purpose is to deprive non-residents from holding certain lands in Nebraska. So far as the object and purpose of the act is concerned there can be no difference drawn between non-residents. All non-residents must necessarily be in the same class. From the standpoint of this legislation it is as bad for a Russian to hold land in Nebraska as for an Irishman, both being non-resident aliens, and it is as bad for a resident of Massachusetts to hold land in Nebraska as it is for an Englishman, both being non-residents of Nebraska. There is absolutely no legitimate public reason for classifying non-residents, other than the fact that limited by the constitution of the state the legislature can only reach a small class. Not being able to reach the great majority of the class against whom the act is aimed, it ought not to be permitted to stand against the limited few who stand in the same position.

See also *Connelly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, where the court, construing the trust statutes of Illinois held that the law was void because it exempted a certain class of people from its

consideration and therefore violated the fourteenth amendment of the Constitution of the United States.

Taking all the constitutional restrictions, the laws, the treaties and statutes together, we submit that the law in question violates section 2, article 6 of the Constitution of the United States.

Second, it violates the treaties of the United States and Great Britain.

Third, it violates the 14th amendment of the Constitution of the United States.

Fourth, it violates the Constitution of the State of Nebraska, section 25, article 1, section 15, article 3.

Fifth, that if the act is held to be constitutional, then the only constitutional interpretation and construction of the law is to hold that all non-resident aliens acquire title to real estate and limiting their holdings until the land is escheated to the state by proper proceedings.

We respectfully submit that the judgment of the trial court was wrong and should be reversed.

ALMON W. BULKLEY,
CLAIR E. MORE,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiffs in Error.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 284

WILLIAM TOOP et al., *Plaintiffs in Error.*
vs.
ULYSSES LAND COMPANY et al., *Defendants in Error.*

In Error to the District Court of the United States for the District of Nebraska.

Motion by Plaintiffs in Error to Reverse Pro Forma Without Prejudice, and Remand Cause to Court Below with Leave to Make Indispensable Parties Defendants.

ALMON W. BULKLEY,
CLAIR E. MORE,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiffs in Error.

CHAMPLIN LAW PRINTING CO.

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Motion by Plaintiffs in Error to Reverse Pro Forma Without Prejudice, and Remand Cause to Court Below with Leave to Make Indispensable Parties Defendants.

Come now the plaintiffs in error, by their attorneys aforesaid, and move the court to reverse and set aside the judgment of the District Court of Nebraska without prejudice, and remand the cause to that court with leave to the plaintiff therein to substitute and make defendants in the place of the defendant Ulysses Land Company, William I. Toop and Emily Tremlin, to the end that they may be summoned into said court and new issues formed and tried and judgment rendered, for the following reasons:

First. The controversy involves title to one hundred sixty (160) acres of Nebraska farm land. Plaintiffs in error, who were plaintiffs below, claim title to an undivided two-thirds part thereof as heirs at law of John Toop, deceased, and at the time of the trial and judgment in the court below defendant, Ulysses Land Company, a corporation, was in possession and claimed title to the whole of said quarter section of land under a deed from Frank Palmer who obtained the same by deed from William I. Toop and Emily Tremlin and others who claimed to be the sole heirs at law of John Toop, deceased. The action is ejectment.

Second. At the time the judgment was rendered in the District Court and the case removed to this court there was pending in the District Court of Butler County, Nebraska, a suit by said William I. Toop and Emily Tremlin, the grantors of said defendant, Ulysses Land Company, to set aside the deeds of conveyance from them to Frank Palmer and from Frank Palmer to the Ulysses Land Company for alleged fraud. After the judgment was rendered in the District Court and this writ of error was sued out that suit resulted in a decree in favor of the plaintiffs and against the Ulysses Land Company and Palmer setting aside said deeds and quieting title to the land in William I. Toop and Emily Tremlin, which decree was afterwards on February 26, 1915, affirmed by the Supreme Court of Nebraska. (See *Toop* v. *Palmer,* 151 Northwestern Rep. 301.)

Third. That suit in the Nebraska courts did not involve any of the issues involved in the controversy here, inasmuch as both parties to that con-

troversy and the court assumed, that the grantors of Palmer and the Ulysses Land Company were the only heirs at law of John Toop, deceased.

Fourth. We are advised that the application of the Ulysses Land Company to the Supreme Court of Nebraska for a rehearing of that case has been very recently denied so that the judgment and decree of the District Court of Butler County, Nebraska, has become final as between the plaintiffs in that suit and the defendant, Ulysses Land Company.

Fifth. The result of that litigation in Nebraska has entirely changed the situation regarding the suit here, inasmuch as the defendant, Ulysses Land Company, has no interest whatever now in the suit here, the real parties interested here adversely to plaintiffs in error being William I. Toop and Emily Tremlin and they not being parties to the suit here.

Sixth. William I. Toop and Emily Tremlin, by their attorneys, R. C. Roper and C. M. Skiles, have submitted to this court a suggestion as *amici curiae,* suggesting that this court dimiss the cause here, or if it shall be retained for hearing upon the merits, that then they be permitted to file briefs as *amici curiae.*

Seventh. We have suggested to them that they enter the appearance of their clients in this cause in this court so as to be bound by the judgment rendered by this court, but this they decline to do, alleging that "William I. Toop and Emily Tremlin cannot safely appear or intervene in this suit for the reason that the stipulated statement of facts con-

tained in the record is not such that they could agree thereto." They ought not in fairness to be permitted to appear in this court and argue the case of their clients unless their clients are to be bound by the decision of the court in case the decision was against their interest, nor, under the circumstances, ought the case to be tried in this court until we have the real parties in interest in court.

Eighth. As the case now stands, the judgment of the District Court of Nebraska does not in any way benefit the defendant, Ulysses Land Company, in whose favor it was rendered, and the interest of the Northwestern Mutual Life Insurance Company as mortgagee, is protected by the judgment of the Nebraska court so that it is not interested in the judgment.

In view of the fact that this court has jurisdiction by means of the writ of error sued out here over the judgment of the District Court of Nebraska, we now ask that the court vacate and set aside that judgment without prejudice to any party's rights, and remand this cause to the District Court of Nebraska with leave to the plaintiff to make William I. Toop and Emily Tremlin indispensable parties defendant, have them summoned into court for such proceedings as to law and justice may appertain.

ALMON W. BULKLEY,
CLAIR E. MORE,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court

OF THE

United States

WILLIAM TOOP, EMMA MUSSELWHITE, et. al.,
Plaintiffs in Error,
vs.
ULYSSES LAND COMPANY, A CORPORATION, THE NORTHWESTERN LIFE INSURANCE COMPANY, A CORPORATION, and WILLIAM GASKILL,
Defendants in Error.
No. 284.

In Error to the District Court of the United States for the District of Nebraska, Lincoln Division.

OCTOBER TERM, A. D. 1914.

Suggestion (by friends of the Court) of Grounds for Dismissal of Cause and for Leave to File Briefs if Case is Retained for Hearing.

R. C. ROPER and C. M. SKILES, Attorneys and *Amici Curiae*.

MAY IT PLEASE THE COURT:

The above named, R. C. Roper and C. M. Skiles, attorneys at law of David City, Nebraska, appearing

solely as friends of the Court, and not otherwise, respectfully suggest the following facts, not appearing of record in this cause, as grounds (1) for the dismissal of above cause, and (2) for leave to file briefs as friends of the Court, in event the case shall be retained for hearing upon the merits:

First. On February 26th, 1915, the Supreme Court of Nebraska rendered a decision in a case, wherein William I. Toop, Lou M. Toop, Jesse Toop, Sophie M. Toop, Sarah Jane Dyer, David J. Dyer, Florence Behrend, Emily Tremlin and Charles Tremlin were appellees, and Frank Palmer and The Ulysses Land Company were appellants, and The Northwestern Mutual Life Insurance Company, also appellee.

Second. The Ulysses Land Company, appellant, and the Northwestern Mutual Life Insurance Company, appellee, in the Nebraska case, are the same identical parties who are named as defendants in error in this cause.

Third. The Nebraska case mentioned above involved the same premises, which are in controversy in this suit, and included, with others, the same issues now presented to this Court.

Fourth. The American heirs of John Toop began the above state suit in the District Court of Butler County, Nebraska, on the 9th day of June, 1911, the purpose of which was to cancel certain conveyances made to The Ulysses Land Company and Frank Palmer, covering the premises in dispute, and such case was pending when the English kin of John Toop began their suit in Federal District Court at Lincoln, the case now at bar.

Fifth. The District Court of Butler County, Ne-

braska, cancelled and set aside all of the conveyances made to Frank Palmer and the Ulysses Land Company, quieted the title to the land in William I. Toop and Emily Tremlin, and denied the pretended claims of the Ulysses Land Company. The land company and Palmer appealed to the Supreme Court of Nebraska where the decree of the district court of Butler county was affirmed *in toto*, as referred to in paragraph "First" hereof. (See Exhibit "A" attached.)

Sixth. The above named, R. C. Roper and C. M. Skiles, were and are the attorneys of record for the American heirs in the above matters.

Seventh. The Ulysses Land Company, defendant in error herein, therefore, according to the decision of the Supreme Court of Nebraska, has no interest whatever in the land in controversy herein, is not a real party in interest in this suit, and has no interest in securing a determination in this Court. An adjudication by this Court, as between the parties now in court, will determine nothing, and will be of no benefit to the plaintiffs in error, but may work an irreparable injury to the American heirs, who now have title to the premises by virtue of the decision of the Nebraska Supreme Court.

Eighth. This Court has no jurisdiction over the subject matter involved in this suit.

Ninth. William I. Toop and Emily Tremlin, in whom the title to the premises in controversy has been quieted by the Supreme Court of Nebraska, are now, and were, at the time of the filing of this suit in the District Court of the United States at Lincoln, the real and sole parties in interest (except the Northwestern Mutual Life Insurance Company) in

said premises. They are indispensable parties defendant, without whose presence in this suit, this Court is powerless to proceed to an adjudication, since no decision can be rendered herein (except an affirmance of the lower Court's decree) without irrevocably and injuriously affecting the rights and interests of William I. Toop and Emily Tremlin, who are not parties herein.

Shields vs. Barrow, 17 How (U. S.) 158.

Cameron vs. M'Roberts, 3 Wheat. (U. S.) 591.

16 Cyc., 181, 183, 185, 188, 189.

20 Cyc., 715, 392.

Tenth. The plaintiffs in error in this suit had full knowledge of the rights and claims of William I. Toop and Emily Tremlin, in the premises, before and at the time of filing the case at bar.

Eleventh. William I. Toop and Emily Tremlin cannot safely appear or intervene in this suit for the reason that the stipulated statement of facts contained in the record is not such that they can agree thereto.

Twelfth. Attached hereto and made a part hereof are Exhibit "A," being a copy of the opinion of the Nebraska Supreme Court in the case referred to, and Exhibit "B," being the affidavit of R. C. Roper and C. M. Skiles.

Wherefore, the undersigned, R. C. Roper and C. M. Skiles, as friends of the Court, respectfully suggest the dismissal of this cause for the reasons given herein; or, if the case shall be retained for hearing upon the merits, then that they be permitted to file briefs, as friends of the Court, to the end that the interests of their clients may be protected and safe-

guarded, and that, for such purpose, the Court may grant them a reasonable time in which to prepare, serve and file such briefs, in answer to the brief and argument of plaintiffs in error filed herein.

Respectfully submitted,

R. C. ROPER,
C. M. SKILES,
Attorneys and *Amici Curiae*.

EXHIBIT A.

TOOP v. PALMER.

No. 17852. Opinion filed February 26, 1915.

Plaintiffs, citizens of this country and residents of sister states, were sole heirs of the owner of a farm in Butler County who died intestate and without issue. There were living nonresident aliens of the same degree of kinship to the decedent as plaintiffs. Plaintiffs had not been advised as to their legal rights and supposed that their alien kinsmen were joint heirs with them to the said farm, in the proportion of one-third to them and two-thirds to such aliens. Defendant Palmer, acting for himself and for those who subsequently formed the defendant land company, with full knowledge of the mistaken belief under which plaintiffs were laboring, induced them to sell the land to him for a sum based upon the valuation of a one-third interest therein. He at the time did not inform plaintiffs of their mistake, but added to their belief that they only owned a one-third interest, by representing to them that he intended to purchase the other two-thirds interest from the alien heirs. *Held*, a fraudulent transaction from which plaintiffs are entitled to be relieved, as against the defendant Palmer and all others acting in concert with him in said fraudulent transaction, or

who subsequently obtained any title or interest in the land, directly or indirectly, with knowledge of his fraud.

HAMER, J.

The defendants, Frank Palmer and the Ulysses Land Company, appeal from the judgment of the district court of Butler County. John Toop, who was born in England, located in Butler County, Nebraska, during the year 1884. He continued to reside in that county until July 28, 1897, when he died intestate, seized in fee of 160 acres of land in that county near Ulysses and being the premises in controversy. He left surviving him Sarah A. Toop, his widow, and who resided with him upon the premises, and the following next of kin, to-wit: The children of Betsy Orchard, who was a deceased sister; the children of William Toop, who was a deceased brother, all of whom were English citizens and residents of England, and shall hereafter be referred to as such English kin; Emily Tremlin, of Pinconning, Michigan, Jane Dyer, of Kane County, Illinois, being the children of Mary AnnPlowman, a sister of Mr.Toop; and William I., Jesse Toop and Florence Behrend, all of Auburn, Iowa, and who were the grandchildren of Mrs. Plowman, the surviving issue of William Toop, a deceased son of Mary Ann Plowman.

Unless the English kin inherit, the sole heirs at law of John Toop, at his death aside from his widow, were Mrs. Tremlin and Mrs. Dyer. The English kin were related to John Toop in the same degree as were Mrs. Tremlin and Mrs. Dyer. Whether or not they inherit depends upon the efficiency of our statute barring aliens from inheritnig which is now

in litigation in the supreme court of the United States in an action pending between the English kin and the defendants in this action. When John Toop died in 1897, he left a widow who died in 1907; he left as next of kin, children of a brother and sister who were nonresident aliens, being citizens of England, above referred to, and he also left the children of a sister, the latter being residents and citizens of the United States, residing in Iowa, Illinois and Michigan. It is claimed by the appellee that it is conceded under Section 10874, Ann. St. 1911, that nonresident alien heirs could not and did not inherit farm lands and that no treaty was then in force abrogating the statutes. It is therefore claimed by the appellees that it is conceded that the children of the deceased sister who reside in the United States and were citizens of the United States, took the whole of the farm lands of which John Toop died seized, being a quarter section of farm land near Ulysses, valued at $20,000. There is also some town property which is not in issue in this suit.

Soon after the death of Sarah A. Toop, the widow of John Toop, Frank Palmer, the principal defendant, talked to his brother Alfred Palmer, Reed Rihart, H. L. Pence and H. C. Withers about buying land. This talk was in the flouring mill at Ulysses being the place where Pence worked, and where it is claimed these parties then met to talk over their business ventures. It is claimed by the appellees that Frank Palmer, before the meeting at the mill, had advised with two different attorneys as to whether the English heirs could inherit and that he stated at the meeting that he had been advised that the English heirs did not inherit. It is also claimed by the appellees that those present at the meeting

had good reason to believe that the American heirs did not know of the statute barring the English kin from inheriting and were of the belief that the foreign kin took two-thirds of the estate.

It is further claimed by the appellees that four or five days after the meeting at the mill Palmer went to Iowa and Michigan to buy out the American heirs. The American heirs, believing that they took but one-third of the estate, and being assured by Frank Palmer that such was the fact and that he expected to buy out the English heirs, were quieted by these assurances, and being ignorant of the real value of the farm, quitclaimed their interest in it to Palmer for a total sum of $5000. At the time they did this it is claimed by the appellees that these American heirs believed that they were selling and conveying one-third interest in the farm only, and that the English kin were entitled to the other two-thirds which Palmer had stated to them he intended to buy.

On January 8, 1906, prior to this suit, Sarah Jane Dyer had conveyed to William I. Toop what they then both believed to be a one-third interest, but what was, in fact, as it is claimed by the appellees, a one-half interest. Before the commencement of this suit an amicable adjustment of their mistake was arranged between them to the satisfaction of both parties. For the purpose of this suit it is claimed by the appellees that William I. Toop has succeeded to all the rights and interests of Sarah Jane Dyer, and the latter does not ask for any relief in this suit. The only owners of the land, therefore, at the commencement of this suit, were William I. Toop and Mrs. Tremlin, who owned a half interest each, the other plaintiffs, as it is claimed by the

appellees, probably not inheriting under the construction of our statutes.

When Frank Palmer returned from Iowa and Michigan with his quit-claim deeds he immediately placed them on record and then claimed to be sole owner of the quarter section, which, it is claimed by appellees, is of the value of $16,000 to $20,000, and for which he had only paid $5000. It is said that he then called together the same parties who had met at the mill and planned his trip, "The Mill Conspirators," and suggested the organization of the Ulysses Land Cempany, to play the role of "Innocent Purchaser." It is claimed by the appellees that Palmer then became president and manager of this Ulysses Land Company, the chief purpose of which, if not the only purpose, being to hold the title as an "innocent purchaser." Palmer then conveyed to this company. It is further claimed by the appellees that with the view to further cover up the property the company borrowed six thousand dollars of the Northwestern Mutual Life Insurance Company, although as it is claimed by the appellees the evidence shows that this land company had no use for the money. It is then said by the appellees that Pence moved to Kentucky, being first paid $1000 for his interest in the spoils of the conspirators although he had not put a dollar into the deal.

When the American heirs learned that the English heirs did not inherit they brought suit to cancel their deeds to Palmer on the ground of fraud and conspiracy, misrepresentation and mistakes of fact and tendered back to defendants the $5000 paid them by Palmer.

The district court found for the plaintiffs and setting aside the deeds and decreeing that the $5000

tendered should be applied on the $6000 mortgage of the Northwestern Mutual Life Insurance Company, but allowing the defendants to retain the $1000 balance of the loan. The defendants appeal generally and the plaintiffs appeal from that part of the decree allowing the defendants to retain the $1000 mentioned.

It is claimed by the appellees that Frank Palmer, who personally procured the deeds above mentioned, was the principal participant in a series of fraudulent acts. Some of the matters charged against Mr. Palmer do not appear to have any connection with this case, and as to these matters we will not take any time or expend any labor; we will consider those matters only, which appear to be connected with this transaction. It is charged that his brother, Alfred R. Palmer, his wife, Lillian Palmer, Reed Rihart, his business partner, and H. C. Withers and H. L. Pence, his two intimate friends, were engaged with him in the organization of the Ulysses Land Company. The answer denied all of the alledged fraudulent acts upon the part of Palmer and his associates. Palmer testified that he never told any of the persons associated with him in the deal what he paid for the land nor "anything about how he got the deeds," not even his wife.

Mr. Pence testified that they met at the mill about four days before Palmer went to Iowa and got the quit-claim deeds which the court below cancelled and set aside. The witness further testified that at this meeting "Frank Palmer said he knew of land that he thought would be for sale soon, known as the Toop estate." The understanding of the American heirs seems to have been that two-thirds would go to the English heirs and one-third to the American

heirs. The American heirs were the sole and only heirs who did inherit. Palmer stated in a conversation with Mr. McGowan that he felt pretty safe because he had the opinion of the two lawyers, naming them, that the English heirs did not inherit. The scheme to get the deeds appears to have been a joint affair, although Palmer was more active in the transaction than anyone else. Mr. Pence admitted that Mr. Palmer paid him $1000 for his share of the profits in the transaction. This fact was also stated by Mr. Palmer to S. E. Robey. Whatever Pence got out of the deal, whether it was $1000 or $775 or any other sum, he was in any event well paid because he did not invest a cent. Mr. Pence claims that the organization of the company was suggested by Mr. Palmer after he got back from buying the land and when he "got the deeds for it in his name." The parties who organized the company seem to have all participated in the transaction.

It is claimed on behalf of the appellees that there is no evidence in the record showing that Palmer sought to relieve the American heirs of their belief that the English heirs took two-thirds ot the estate. As a matter of fact, William I. Toop was the owner of one-half of the estate. Mr. Toop believed that the English heirs had a two-thirds interest in the estate. He told Palmer at the bank before the contract was signed for his share that he, Toop, in 1906, while the widow was still living, had tried to buy out the English heirs but had failed. Mr. Palmer then remarked "that he wanted to buy them out if he could buy them right."

The evidence shows that Palmer undertook to establish in the minds of the American heirs who actually inherited the property, the idea that their in-

terest was a comparatively small interest because of the fact that the English kin were also heirs and that they held two-thirds of the estate. An examination of the testimony shows that this idea was continually kept before the heirs that Mr. Palmer met. Palmer knew that there were no English heirs, that while they were English kin they were not heirs, and could not inherit the property, and that by reason of that fact the interest of the American heirs was very much increased. He successfully practiced this deception. He knew that the representations that he was making to Toop and the other heirs were fraudulent and he made these representations apparently with the intent to deceive and obtain this property for little or nothing. The evidence also shows that the Ulysses Land Company was organized in furtherance of the scheme to defraud the plaintiffs. This is one of the cases where the facts cannot be dwelt upon without saying things that seem to be harsh.

The knowledge which the defendants had of the actual condition of the title and ownership of the land they kept to themselves and they thereby deceived and misled the plaintiffs as to material facts within their knowledge when common honesty required a truthful statement. To deny the plaintiffs relief would be to shield and encourage fraud. We are unable to find any reason for setting aside the judgment of the district court. We think it is right and it is AFFIRMED.

Letton, Rose and Sedgwick, J. J., not sitting.

THE STATE OF NEBRASKA, SS:

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by

said court on the 26th day of February, 1915, with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 27th day of February, 1915. H. C. LINDSAY, Clerk.

(SEAL) By VICTOR SEYMOUR, Deputy.

Revenue Stamps.

EXHIBIT B.

THE STATE OF NEBRASKA } ss
BUTLER COUNTY }

R. C. Roper and C. M. Skiles, being first duly sworn, upon their oaths, each deposes and says: That they are regularly admitted and practicing attorneys at law, residing at David City, Nebraska; that they are and were attorneys of record for the American heirs, who were plaintiffs in the case of William I. Toop, Lou M. Toop, Jesse Toop, Sophie M. Toop, Sarah Jane Dyer, David J. Dyer, Florence Behrend, Emma Tremlin, and Charles Tremlin, vs. Frank Palmer, The Ulysses Land Company, and The Northwestern Mutual Life Insurance Company, which was begun on the 9th day of June, 1911, in the District Court of Butler County, Nebraska, and later appealed to the Supreme Court of Nebraska by the defendants; that on February 26th, 1915, the Supreme Court of Nebraska handed down a decision in said case, affirming *in toto* the decree of the District Court of Butler County, Nebraska, wherein title to the premises involved therein was quieted in William I. Toop and Emily Tremlin in fee simple, and the pretended claims of the Ulysses Land Company were

denied; that the Ulysses Land Company and the Northwestern Mutual Life Insurance Company, who were named as defendants in the Nebraska case, are the same identical parties who are named as defendants in error in the suit (No. 284) now pending in the Supreme Court of the United States; that the premises involved in the Nebraska case are the identical premises involved in the Federal case; that Exhibit "A," attached hereto, is a true, correct, complete, and perfect copy of the opinion of the Supreme Court of Nebraska, rendered in the case herein referred to, a duly certified copy thereof being now in our possession.

R. C. Ropes

C. H. Sikes

Subscribed and sworn to before me this 8th day of March, 1915.

A. A. Sorensen

Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1912.

No. 234.

WILLIAM TOOP ET AL., PLAINTIFFS IN ERROR,

vs.

ULYSSES LAND COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

SUGGESTIONS BY AMICI CURIÆ OF OBJECTIONS TO ALLOWANCE OF "MOTION BY PLAINTIFFS IN ERROR TO REVERSE PRO FORMA" AND OF GROUNDS FOR DISMISSAL OR AFFIRMANCE.

R. C. ROPER AND
C. M. SKILES,
Attorneys and Amici Curiæ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914.

No. 284.

WILLIAM TOOP ET AL., PLAINTIFFS IN ERROR,

vs.

ULYSSES LAND COMPANY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

Suggestions by Amici Curiæ of Objections to Allowance of "Motion by Plaintiffs in Error to Reverse Pro Forma" and of Grounds for Dismissal or Affirmance.

Come now R. C. Roper and C. M. Skiles, attorneys and *amici curiæ*, as shown in the printed "Suggestion" already filed herein, and as such *amici curiæ* suggest to the court—

(1) Objections to the allowance of the motion of plaintiffs in error to reverse *pro forma* without prejudice and to re-

mand this cause for the purpose of substituting new parties defendant, and

(2) Grounds for dismissal of the appeal or affirmance of the judgment of the lower court.

I.

Objections to Allowance of Motion.

1. It is admitted in the motion itself that defendants in error have no interest whatever in this appeal (pp. 3-4); that the Supreme Court of Nebraska has decreed that the Ulysses Land Company, defendant in error herein, has no right, title, or interest whatever in the land in question (p. 4), and that title to the premises involved has been quieted in William I. Toop and Emily Tremlin (p. 3). The result is that there are now no defendants in error in this appeal.

2. Plaintiffs in error, therefore, by their motion, in effect, ask this court for permission to *substitute* (not add) entirely new and different parties defendant; in fact, to institute a new case, and that, too, by mere *amendment* to be made in the court below.

Such an amendment will not be allowed (either by this court or the lower court) so as to permit an entire change of defendants by means of substitution, and thereby an entirely new and different case.

New Mexico Land Co. *vs.* Elkins, 22 Blatchf. (U. S.), 203.
Goodyear *vs.* Brown, 3 Blatchf. (U. S.), 266.
Hal *vs.* Wilson, 9 Wall. (U. S.), 503.
Little *vs.* Virginia & Water Co., 9 Nev., 317.
Jameson *vs.* Deshields, 3 Gratt. (Va.), 5.
Western R. Co. *vs.* McCall, 89 Ala., 375.
Davis Ave. R. Co. *vs.* Mallon, 57 Ala., 168.
Bassett *vs.* Fisk, 75 N. Y., 303.
New Jersey, &c., *vs.* Ames, 12 N. J. Eq., 507.
Hunnicutt *vs.* Stone, 85 Ga., 435.

The motion does not ask that new parties be *added* in the court below, but that entirely different parties defendant be *substituted* for those now in the case. This, under the authorities, cannot be done.

II.

Grounds for Dismissal or Affirmance.

1. Indispensable parties are without the jurisdiction of this court. In their absence the court is powerless to proceed (except to dismiss or affirm) without injuriously and irrevocably affecting the rights of such parties.

Shields *vs.* Barrow, 17 How., 130.
Coiron *vs.* Millandon, 19 Hav., 113.
Cameron *vs.* M'Roberts, 3 Wheat., 591.
16 Cyc., 181, 183, 185, 188, 189.
20 Cyc., 392, 715.

2. This court should either dismiss the appeal or affirm the judgment of the lower court, as no actual controversy exists between the parties to the record and no effectual relief can be granted to plaintiffs herein, since new defendants cannot be substituted.

Little *vs.* Bowers, 134 U. S., 547, 557.
Mills *vs.* Green, 159 U. S., 651.
I. U. Cent. R. Co. *vs.* Adams, 180 U. S., 28, 32.
Washington Market Co. *vs.* District of Columbia, 137 U. S., 62.
Jones *vs.* Montague, 194 U. S., 147.
Selden *vs.* Montague, 194 U. S., 153.
Lord *vs.* Veazie, 8 How., 250-251.

3. The judgment of the lower court should be affirmed for the reasons given in the brief of *amici curiæ* referred to in the printed Suggestion heretofore filed, wherein request

was made to file such brief, which request is now renewed. Among the reasons for affirmance were the following:

(*a*) No Federal question is involved in this appeal.

(*b*) Plaintiffs in error cannot raise question of unconstitutionality of the Nebraska law of 1889, since no rights of theirs were affected thereby.

(*c*) The treaty of 1900 with Great Britain, having been negotiated and proclaimed subsequent to the death of intestate, at which time title vested, secured to the plaintiffs in error no rights whatever, was not retroactive, and, therefore, presents now no debatable Federal question in this appeal.

(*d*) The holdings of the Nebraska court must govern in construing the effect of the law of 1889, since no Federal question is presented.

Elmendorf *vs.* Taylor, 10 Wheat., 159-160.

Third parties, who are not parties to the record, but whose rights and interests may be affected by the decision of this court, may make suggestions of the nature herein contained.

Cleveland *vs.* Chamberlain, Black, 419.

Hilton *vs.* Dickinson, 108 U. S., 165, 168.

American Wood Paper Co. *vs.* Heft, 131 U. S., Appx., xcvii.

Northern Securities Co. *vs.* U. S., 191 U. S., 555.

The undersigned were served with notice by plaintiffs in error for the proposed hearing upon their motion.

Respectfully submitted,

R. C. ROPER,
C. M. SKILES,
Amici Curiæ.

INDEX

I. STATEMENT 1-4

II. PROPOSITIONS OF LAW RELIED UPON 5-10

III. ARGUMENT 10-74

A. As to Validity of Act of 1889..... 11-52

1. Counsel's First Proposition..... 11-52

Our contentions:

a. Act of 1889 not unconstitutional under Sec. 2, Art. 6, of Fed. Const. nor by reason of Treaty with Great Britain..... 11-22

Ahrens v. Ahrens, 123 N. W., 165 11-22

Wunderle v. Wunderle, 33 N. E., 195 11-22

And other cases cited 11

b. Complainants have not complied with requirements of treaty 12

Ahrens v. Ahrens, 123 N. W... 12-13

c. Treaty furnishes no protection to their rights..... 14

d. Title vested immediately in American heirs on death of John Toop, intestate..... 14

Brown v. Webster, 87 Neb. 788, and other cases..... 14

e. Treaties are not retroactive as to right of succession..... 15-21

Chirac v. Chirac, 2 Wheat. (U. S.) 259 15

Prevost v. Greneaux, 19 How. S.) 1 15

f. Nebraska Statute of Descent of Real Property 15
g. Contingent and Vested Estates in Remainder 16-18
Schuyler v. Hanna, 31 Neb. 310 17-18
h. Partition proceedings could have been had or action to quiet title to premises 17-18
Sec. 8309, Rev. Stats. 1913.... 17-18
Oliver v. Lansing, 50 Neb. 839 17-18
First National Bank v. Pilger, 78 Neb. 178, etc..... 17-18
i. Law in force at death of intestate controls 18-19
Minkler v. Woodruff, 12 Neb. 270 19
j. Question one of local law solely 19
Blythe v. Hinckley, 180 U. S. 341 19
Lessee v. McCartee, 6 Pet. (U. S.) 102 19
k. Construction by Nebraska Court will prevail..... 19
Elmendorf v. Taylor, 10 Wheat. (U. S.) 159..... 19
l. Neb. Non-resident Alien Ownership Act 21
Construed and upheld by the courts:
Glynn v. Glynn, 62 Neb. 872.. 22
Dougherty v. Kubat, 67 Neb., 269 22

Wunderle v. Wunderle, 144 Ill. 40 22
And other cases 22
2. Counsel's Second Proposition.....22-33
Our contentions:
a. Right to inherit not a vested right 23
Donaldson v. State, 67 N. E. 1029 23
Wunderle v. Wunderle, 33 N. E. 195 23
b. Act is not special legislation.. 23-26
Doughert v. Kubat, 67 Neb. 269 33
Livingston v. Drummond, 49 Neb. 200 32
c. Illinois statute 25
Wunderle v. Wunderle, 33 N. E., 195 25
d. Statute should be upheld unless clearly unconstitutional.. 32
Donaldson v. State, 67 N. E., 1032 32
Legal Tender cases, 12 Wall. 457 32
3. Counsel's Third Proposition..... 33
Our contentions:
a. Act is not broader than its title 33
Dougherty v. Kubat, 67 Neb. 269 33-34
4. Counsel's Fourth Proposition... 35
Our contentions:
a. Act is complete in itself, etc... 35

Vanhorn v. State, 46 Neb. 79.. 35
State v. Ream, 16 Neb. 681.... 35
5. Counsel's Fifth Proposition..... 35
Our contentions:
a. Complainants must recover on their own title 35-36
Reams v. Sinclair, 88 Neb. 739. 35-36
Smith v. Curtice, 73 Neb. 167.. 35-36
b. Counsel's authorities not in point 37-38
c. Common law and St. 11 & 12, Wm. III. c. 6, in force in Nebraska 39-43
Sec. 3697, Rev. St. 1913..... 39-43
Clement v. Graham, 78 Vt., 290 39-43
Cobourn v. Harvey, 18 Wis. 147 39-43
Kinkead v. Turgeon, 109 N. W., 745 39-43
Kerner v. McDonald, 84 N. W., 92 43-45
d. Citizens may inherit through aliens 38-39
Abrams v. State, 88 Pac. 331.. 38-39
B. Plaintiffs in Error Cannot Raise Question of Unconstitutionality... 47
Donaldson v. State, 67 N. E., 1033. 47
Hager v. Reclamation Dist., 111 U. S., 701 47
C. No Federal Question Involved in this Case 48-9
D. Holdings of Nebraska Court Must Govern 49-50

Elmendorf v. Taylor, 10 Wheat., 159-160 49-50
E. Authority of the States to Prohibit Alien Ownership 50-51
Chirac v. Chirac, 2 Wheat. 259..... 50-51
Hauenstine v. Lynham, 100 U. S., 484 50-51
Donaldson v. State, 67 N. E., 1030.. 50-51
Blythe v. Hinckley, 180 U. S., 186.. 50-51
F. As to Construction of Act of 1889... 52
Carlow v. Aultman, 28 Neb., 672... 53
Taking by purchase and descent at common law 53-57
6. Counsel's Sixth Proposition..... 54
Our contentions:
a. The act must be construed strictly 55
Wunderle v. Wunderle, 33 N. E., 195 55
b. Complainants did not take a defeasible title 56
c. Outline of Act of 1889..... 60
d. Nothing will be read into statute 61-62
Douglas v. Cameron, 47 Neb., 361 61-62
Wunderle v. Wunderle, 33 N. E., 195 61-62
e. Provisos must receive a strict construction 64-65
U. S. Dickson, 15 Pet. 54..... 64-65
State v. Twin City Tel. Co., 116 N. W. 837 64-65

f. Provisos do not bear out counsel's theory 65-66
g. Word "acquire" does not include "by inheritance"..... 67-68
Bennett v. Hibbert, 55 N. W., 93 67-68
Burrow v. Burrow, 77 N. W. 288 67-68
G. The American heirs are indispensable parties without whose presence in this case, the Court cannot proceed to a decree except one of affirmance or dismissal 72-73
Shields v. Barrow, 19 How. (U. S.) 137 71-73
16 Cyc. 181-189 72-73
20 Cyc. 392, 716..... 72-73

IN THE

Supreme Court

OF THE

United States

WILLIAM TOOP, EMMA MUSSELWHITE, *et al.*,
Plaintiffs in Error,

vs.

ULYSSES LAND COMPANY, a corporation, THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation, and WILLIAM GASKILL, *Defendants in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

October Term, A. D. 1914.

BRIEF OF AMICI CURIAE.

R. C. ROPER and C. M. SKILES,

Attorneys and Amici Curiae.

I. STATEMENT.

R. C. Roper and C. M. Skiles, who, as friends of the court, present this brief for consideration in above cause, are duly admitted and practicing at-

torneys at law of David City, Nebraska, and attorneys of record in a case recently decided in the Supreme Court of Nebraska, wherein William I. Toop, Jesse J. Toop, Emily Tremlin, Sarah J. Dyer, and others, are plaintiffs, and Frank Palmer, Ulysses Land Company, a corporation, and the Northwestern Mutual Life Insurance Company, a corporation, are defendants.

The Ulysses Land Company and the Northwestern Mutual Life Insurance Company, parties defendant in the Nebraska case, are also defendants in error in this case. The American kin of John Toop, plaintiffs in the Nebraska case, are not parties in this case.

The case decided in the Supreme Court of Nebraska involves the same premises in controversy herein, namely, the 160 acres of farm land near Ulysses, Butler County, Nebraska, of which John Toop died seized in 1897.

The American heirs of John Toop began a suit in equity in the district court of Butler County, Nebraska, on June 9th, 1911, the purpose of which was to cancel and set aside certain conveyances of the land made by them to one Frank Palmer, and by him, to the Ulysses Land Company. The conveyances sought to be cancelled covered the premises in dispute herein. The ground alleged for relief was the fraud practiced by Palmer and the Ulysses Land Company in the procurement of the deeds in question. The district court of Butler County granted

the relief prayed for, cancelled and set aside all of the conveyances, and quieted title in the American heirs. Palmer and the Ulysses Land Company appealed to the Supreme Court of Nebraska, where, on February 26th, 1915, the decree of the district court was affirmed, quieting the title in the American heirs of John Toop.

The Ulysses Land Company, defendant in error herein, has no real interest, therefore, in the controversy before this court, while the American heirs, in whom the Nebraska courts have quieted title, are the sole real parties in interest in the premises. They are not parties here.

The Nebraska case was pending in the courts of that state prior to the commencement of this suit in the Federal courts, of which fact the plaintiffs in error had knowledge. They likewise knew, before the commencement of this case, that the American heirs of John Toop were claiming to be the sole owners and parties interested in the lands of which John Toop died seized.

The opinion of the Nebraska Supreme Court will be found in the printed suggestion filed herewith.

In the preparation of this brief, we have not had access to the original record, and, therefore, are not informed of its contents except as to such matters as appear in the brief of plaintiffs in error, copy of which counsel have kindly furnished.

The stipulated statement of facts appearing on pages 3 to 5 of the brief contains inaccuracies and omits material facts affecting the rights of the American heirs, and, for this reason, had they been parties to this appeal, they could not have agreed thereto.

It is stated on pages 2 and 3 of brief, that John Toop died in July, 1898, whereas he died in July, 1897.

Again, it is stated on page 2, that it nowhere appears that Mary Ann Plowman ever became a citizen of the United States, whereas we contend that Mrs. Plowman became a citizen of the United States and resided in this country for more than twenty years.

II. PROPOSITIONS OF LAW RELIED UPON.

1. The Nebraska non-resident alien ownership act of 1889 does not violate Section 2, Article 6, of the constitution of the United States, nor is it rendered unconstitutional or ineffective by the treaty of 1900 with Great Britain.

Ahrens v. Ahrens, (Iowa) 123 N. W. 165.
Wunderle v. Wunderle (Ill.) 33 N. E. 195.
Opel v. Opel, (Iowa) 69 N. W. 560.
Kull v. Kull, (N. Y.) 37 Hun. 476.
Schultz v. Schultz, (Ill.) 33 N. E. 203.

2. The treaty with Great Britain did not secure to the plaintiffs in error the right to inherit as heirs of John Toop, since,

(a) The title to the land in question had already vested by operation of law in the American heirs before the treaty was concluded. The title vested immediately upon the death of the owner, in the heirs designated by the statutes and in none other, subject to the life estate of the widow. Plaintiffs in error, being non-resident aliens, could not take under the statutes.

Brown v. Brown, 87 Neb. 788; 128 N. W. 635.
Rakes v. Brown, 34 Neb. 304; 51 N. W. 848.
Security Inv. Co. v. Lottridge, 2 Unof. (Neb.) 489.
Johnson v. Colby, 52 Neb. 327; 72 N. W. 313.
Shellenberger v. Ransom, 41 Neb. 631; 59 N. W. 935.
Lamb v. Wogan, 27 Neb. 237; 42 N. W. 1041.
Sec. 8309, Rev. Stats., 1913.
Oliver v. Lansing, 50 Neb. 839; 70 N. W. 369.
Schuyler v. Hanna, 31 Neb., 311.
First Nat'l Bank v. Pilger, 78 N. W. 168.
Glynn v. Glynn, 62 Neb. 872.

(b) The treaty with Great Britain was not retroactive so as to affect the succession of a person dying before such treaty was concluded.

Prevost v. Grencaux, 19 How. (U. S.) 1.
Chirac v. Chirac, 2 Wheat. (U. S.) 259.
Yeaker v. Yeaker, 4 Met. (Ky.) 33; 81 Am. Dec. 530.
Jecker v. Magee, 9 Wall. (U. S.) 32.
Blight v. Rochester, 7 Wheat. (U. S.) 535.
Society v. New Haven, 8 Wheat. (U. S. 493.
Orser v. Hoag, 3 Hill (N. Y.) 79.
38 Cyc. 972.

(c) The law in force at the death of an intestate must determine who shall take his estate.

Minkler v. Woodruff, 12 Neb. 270.
Stewart v. Russell, 86 N. Y. Sup. 625.
Donaldson v. State, (Ind.) 67 N. E. 1028.
Wunderle v. Wunderle, (Ill.) 33 N. E. 195.
Pilla v. German School Assn., 23 Fed. 700.
Donovan v. Pitcher, 53 Ala. 411; 25 Am. Rep. 634.

(d) "The question is one of purely local law, and, as such, must be determined by this court."

Blythe v. Hinckley, 180 U. S. 341.
Lessee v. McCartee, 6 Pet. (U. S.) 102.
Minkler v. Woodruff, 12 Neb. 270.

(e) In cases depending on the laws of a particular state, this court will adopt the construction which the courts of such state have given to its laws, and such construction will be received by this court as the true construction.

Elmendorf v. Taylor, 10 Wheat. (U. S.) 159.

3. The Nebraska non-resident alien ownership act of 1889 has been construed and upheld by the Supreme Court of Nebraska. Courts of other states have construed and upheld similar laws. Such laws have been held constitutional.

Glynn v. Glynn, 62 Neb. 872; 87 N. W. 1052.
Dougherty v. Kubat, 67 Neb. 269; 93 N. W. 317.
Toop v. Palmer, —— Neb. ——.
Wunderle v. Wunderle, 144 Ill. 40; 33 N. E. 195.

Ryan v. Egan, 156 Ill. 224.
Schultz v. Schultz, 144 Ill. 290.
Ahrens v. Ahrens, (Iowa) 123 N. W. 165.
Opel v. Opel, (Iowa) 69 N. W. 560.
Kull v. Kull, 37 Hun. (N.Y.) 476.
Mick v. Mick, 10 Wend. (N. Y.) 379.

4. Neither citizens nor aliens have any property or vested rights of inheritance in the estates of their living kindred.

Wunderle v. Wunderle, (Ill.) 33 N. E. 199.
Donaldson v. State, (Ind.) 67 N. E. 1029.

5. The act of 1889 is not special legislation.

Dougherty v. Kubat, 67 Neb 269.
Linvingston v. Drummond, 49 Neb. 200.
Wunderle v. Wunderle, (Ill.) 33 N. E. 195.

6. A statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution. If there is doubt, such doubt must be resolved in favor of its constitutionality.

Legal Tender Cases, 12 Wall. 457.
Sinking Fund Cases, 99 U. S. 700.
Ogden v. Saunders, 12 Wheat. (U. S.) 212.
Wunderle v. Wunderle, 33 N. E. 195.
Donaldson v. State, 67 N. E. 1032.

7. The act is not unconstitutional as being broader than its title.

Dougherty v. Kubat, 67 Neb. 269.

8. Plaintiffs in error must recover, if at all, upon the strength of their own title and not upon the weakness of the title of their adversaries.

Reams v. Sinclair, 88 Neb. 738; 130 N. W. 562.
Smith v. Curtice, 73 Neb. 167; 102 N. W. 241.
Abbott v. Coates, 62 Neb. 247; 86 N. W. 1058.

9. The grantors of defendants in error—the American kin—were the sole and only next of kin of John Toop who were qualified to inherit his estate.

Glynn v. Glynn, 62 Neb. 872.
Dougherty v. Kubat, 67 Neb. 269.
Toop v. Palmer, —— Neb. ——.
Abrams v. State, (Wash.) 88 Pac. 331.

10. The common law of England, including the Statute of 11 and 12, Wm. III, c. 6, which was enacted by Parliament in 1700, in order to permit subjects to inherit, even though they might have to trace their relationship through alien ancestors, has been adopted by statute as the law of Nebraska, in so far as such common law and statute are applicable to, and not inconsistent with, the laws and institutions of that state.

Sec. 3697, Rev. Stats. Nebr. 1913.
Abrams v. State, (Wash.) 88 Pac. 331.
Kinkead v. Turgeon, (Neb.) 109 N. W. 745.
In re Creighton's Estate, (Neb.) 84 N. W. 273.
Ins. Co. v. Jensen, 58 Neb. 522.
Meng v. Coffey, (Neb.) 93 N. W. 713.
Williams v. Miles, (Neb.) 94 N. W. 708.
Clement v. Graham, 78 Vt. 290.
Commonwealth v. Knowlton, 2 Mass. 530.
Patterson v. Winn, 5 Pet. (U. S.) 233.
5 Rul. Cas. Law, 817.
Ann. Cas. 1913 E, 1222.
Coburn v. Harvey, 18 Wis. 147.

11. A state may exclude aliens from acquiring property within its boundaries as its safety or public policy may require.

Chirac v. Chirac, 2 Wheat. 359.
Beard v. Rowan, 9 Pet. 301.
Blythe v. Hinckley, 180 U. S. 186.
Clarke v. Clarke, 178 U. S. 186.
Donaldson v. State, 67 N. E. 1030.

12. Plaintiffs in error cannot question the constitutionality of the act involved.

Hager v. Reclamation District, 111 U. S. 701.
Donaldson v. State, 67 N. E. 1033.

13. All objections urged against the validity of the act are questions affecting the Constitution of Nebraska only, and, hence, this court must be governed by the holdings of the Supreme Court of that state.

Elmendorf v. Taylor, 10 Wheat. 159-160.

14. Plaintiffs in error did not take even a defeasible title to the premises in question.

Wunderle v. Wunderle, 33 N. E. 199.
Ryan v. Egan, 156 Ill. 224.

15. The act in question must be construed strictly. Especially is this true with respect to the several provisos.

Douglas v. Cameron, 47 Neb. 371.
Shellenberger v. Ransom, 41 Neb. 631.
26 *Ency. of Law* (2d ed.) 601.

U. S. v. Dickson, 15 Pet. 54.
State v. Twin City Tel. Co., (Minn.) 116 N. W. 837.
Bennett v. Hibert, (Iowa) 55 N. W. 93.
Burrow v. Burrow, (Iowa) 67 N. W. 288.

16. William I. Toop and Emily Tremlin, in whom the title to the premises in controversy has been quieted by the courts of Nebraska, are, and were, at the time of the commencement of this suit, the sole real parties in interest. They were, and are, indispensable parties defendant, without whose presence in this suit, this court is powerless to proceed to an adjudication (except an affirmance of the lower court's decree) without injuriously and irrevocably affecting the rights of such absent parties.

Shields v. Barrow, 17 How. (U. S.) 158.
Cameron v. McRoberts, 3 Wheat. (U. S.) 591.
16 Cyc. 181, 183, 185, 188, 189.
20 Cyc. 715, 392.

III. ARGUMENT.

In answering the propositions of counsel set forth and discussed in their brief, we shall arrange and consider them under two heads: A Those directed to the *validity* of the act in question; and, B those relating to the *construction* of the act. All page references within parentheses refer to counsel's brief.

A. VALIDITY OF ACT OF 1889.

1. Counsel's First Proposition.

It is contended that the Nebraska non-resident alien act violates Section 2 of Article 6 of the Constitution of the United States, which provides that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Counsel argue: The British Treaty of 1900 secures to subjects of that country the right to inherit, conditionally; the statute in question prohibits; hence, the statute is unconstitutional.

The above clause of the Federal Constitution has been construed in connection with statutes which denied the right of aliens to inherit, and treaties which granted the right. The courts have held that such legislation on the part of the states does not violate the fundamental law. The effect of the treaty with Great Britain is simply to suspend thereafter, for a period of three years from the death of an intestate, the operation of the non-resident alien law of Nebraska, in so far as such law shall affect the rights of next of kin who are subjects of that country. The treaty does not alter the laws of descent nor render the act unconstitutional.

Ahrens v. Ahrens, (Iowa) 123 N. W. 165.
Wunderle v. Wunderle, (Ill.) 33 N. E. 195.
Opel v. Opel, (Iowa) 69 N. W. 560.
Kull v. Kull, (N. Y.) 37 Hun. 476.
Schultz v. Schultz, (Ill.) 33 N. E. 203.

The treaty with Great Britain was proclaimed August 6th, 1900 (p. 7). It provides that a subject of that country shall not be disqualified to inherit real estate in this country, by reason of his alienage, but that he shall be allowed a "term of three years in which to sell the same." (p. 29).

In order to bring plaintiffs in error within the operation of this treaty, counsel present two principal points, the correctness of which we desire to challenge:

(1) They contend that the title to the land in dispute did not vest in the heirs of John Toop until the death of the widow in 1907, which was subsequent to the conclusion of the above treaty, and that, therefore, the English kin, by virtue of such treaty, took an undivided two thirds interest in the land, as heirs of John Toop, notwithstanding the non-resident alien statute in controversy herein.

(2) That the treaty of 1900 with Great Britain was retroactive, and, therefore, secured to the English kin the right to inherit, regardless of when the title vested.

It occurs to us, from an examination of the above treaty (p. 29), that we might concede both above propositions to be correct, and yet successfully contend that counsel have not made their point. The widow died November 9, 1907. Even if title did not vest until then (as claimed by counsel

but denied by us), the English kin, under the terms of the treaty, had three years only, or until November 9th, 1910, in which "to sell the same." Not having sold the land within the time limited, and not having begun this suit until January 31st, 1912, it would seem that their rights under the treaty have been lost by their own failure to comply with its terms.

Upon this point, the Iowa Supreme Court has held:

> "The authorities are quite uniform, also, in holding that, upon failure of the condition imposed by the treaty, the title of the non-resident alien would fail by operation of law. Under such circumstances the treaty furnishes no further impediment to the statute. It ceases, so to speak, to suspend the statute, and the full fee simple title vests in the persons upon whom the statute undertook to cast it in the first instance. This is the net result in all the cases, although it may be reached by a different course of reasoning and by a varying terminology."
>
> *Ahrens v. Ahrens*, (Iowa) 123 N. W. 166.

Citing:

Loricux v. Keller, 5 Iowa 196; 68 Am. Dec. 696.
Sullivan v. Burnett, 105 U. S. 334.
Wieland v. Renner, 65 How. Prac. (N. Y.) 245.
Dochrel v. Hilmer, 102 Iowa 169; 71 N. W. 204.
Schultz v. Schultz, 144 Ill. 290; 33 N. E. 201.
Kull v. Kull, 37 Hun. (N. Y.) 476.

However, we do not urge this as a principal ground for denying plaintiffs in error the relief which they are seeking. We prefer to meet them squarely upon the issues thus presented by them.

The treaty with Great Britain did not secure to the English kin the right to inherit as heirs of John Toop, since,

First. **Title to the land in question had already vested in the American heirs before the treaty was concluded, and such treaty could not divest title already vested; and**

Second. **The treaty was not retroactive.**

Title to real estate in Nebraska vests immediately, upon the death of the owner, in the heirs designated by the statute, and in none other. John Toop died in 1897. The widow died in 1907. Title to the real estate which he owned vested instantly in the American heirs, who were his sole next of kin qualified to take, subject only to the life estate of the widow.

Brown v. Webster, 87 Neb. 788; 128 N. W. 635.
Rakes v. Brown, 34 Neb. 304; 51 N. W. 848.
Security Inv. Co. v. Lottridge, 2 Unof. (Neb.) 489; 89 N. W. 298.
Johnson v. Colby, 52 Neb. 327; 72 N. W. 313.
Shellenberger v. Ransom, 41 Neb. 631; 59 N. W. 935.
Lamb v. Wogan, 27 Neb. 237; 42 N. W. 1041.

It has been specifically held that where the right of succession to real estate is governed by treaty, the treaty is not retroactive so as to affect the succession of a person dying before the treaty was concluded.

Prevost v. Greneaux, 19 How. (U. S.) 1.
Chirac v. Chirac, 2 Wheat. (U. S.) 259.
Yeaker v. Yeaker, 4 Met. (Ky.) 33; 81 Am. Dec. 530.
Jecker v. Magee, 9 Wall. (U. S.) 32.
Blight v. Rochester, 7 Wheat. (U.S.) 535.
Society v. New Haven, 8 Wheat. (U. S.) 493.
Orser v. Hoag, 3 Hill (N. Y.) 79.
38 Cyc. 972.

Nebraska Statute of Descent of Real Property.

Counsel have wholly misconstrued the effect and operation of the Nebraska statute of descent of real property with respect to the rights of their clients thereunder. The statute will be found in full on pages 24 to 26 of their brief. Sections "Second" and "Fifth" are the ones especially involved in this instance:

"Second. If he shall have no issue, his estate shall descend to his widow *during her natural lifetime*, and after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father."

"Fifth. If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his *next of kin*, in equal degree . . . "

Sec. 2545 Stats. of Nebr. 1897.

John Toop died intestate in 1897, leaving no issue, and no father, mother, brother or sister. He left a widow who died in 1907.

Counsel erroneously contend (p. 34) that the "life estate" which the widow took under section three was a *"contingent"* estate; that "while the estate may vest in the heirs upon the death of the owner of the real estate, it is a *contingent vesting, which may be defeated at any time prior to the happening of the time when they come into the enjoyment of their estate;"* that "their title is a *contingent* interest, and the title is held *in abeyance* until the death of the widow; in other words, the title is held *in trust* by the widow for the benefit of the surviving next of kin at her death"; that such title in the heirs *"is subject to be divested before they acquire the enjoyment thereof."* (pp. 35-36).

No authorities are cited in support of the above contentions and the reason is obvious. The only case referred to in the discussion of the theory advanced is that of *Alexander v Alexander*, 26 Neb., 673; 41 N. W. 1065. It is erroneously urged that this case supports the assertion that the heirs of John Toop had *"no right to partition the estate or determine their rights prior to the death of the widow."* (p. 35). The case, however, in no way bears out their claim for it. It simply holds that the heirs could not proceed *against the widow*, defeat *her* life estate, or oust *her* of possession, by means

of a partition suit. The case does not hold that the heirs could not "partition the estate, or determine their rights," *as among themselves,* "prior to the death of the widow."

On the contrary, partition proceedings could have been had by the heirs of John Toop, during the life of the widow; the premises could have been partitioned among the heirs, or even sold, if necessary, under decree of court. This is contemplated by express statute and supported by the decisions.

> Sec. 8309, Rev. Stats., 1913.
> *Oliver v. Lansing*, 50 Neb. 839; 70 N. W. 369.
> *Hurste v. Hotaling*, 20 Neb. 178.
> *Mathews v. Glockel*, (Neb.) 117 N. W. 404.
> *Drake v. Merkle*, (Ill.) 38 N. E. 654.
> *Hayes v. McReynolds*, 144 Mo. 348.

Title to real estate, under the Nebraska law, is never in the air. It is always vested somewhere. In the instant case, it vested immediately in the heirs at law of the intestate, subject to the life estate of the widow. The estate taken by the heirs was not a *"contingent"* remainder, as counsel contend, but a *vested* remainder.

In *Schuyler v. Hanna*, 31 Neb. 310, the question involved was the identical one we are now considering—the present interest of an heir of an intestate, during the life estate of the widow. In that case the widow took a life estate of homestead upon the

death of her husband. The son during the life time of the widow, made a conveyance of his interest. After her death he made another conveyance. The court said:

> "In the case at bar the *remainder* became *vested* in the heirs *on the death of their father.* If any one of the heirs had died *during the existence of the life estate,* the heirs of such deceased heir would have inherited his estate. *That is the law of descent in this state;* therefore the interest of Rudolph Hanna in the homestead being a *vested remainder* at the time he conveyed to Hollebaugh, his interest therein passed by such conveyance, consequently nothing passed by the conveyance to the trustee for his sister, the plaintiff."
>
> *Schuyler v. Hanna,* 31 Neb 311.

An action to quiet title to real estate may be maintained by the remaindermen during the continuance of the particular estate.

> *First National Bank v. Pilger,* 78 Neb. 168; 110 N. W. 704.
>
> *Hail v. Hooper,* 47 Neb. 111; 66 N. W. 33.
>
> *Hobson v. Huxtable,* 79 Neb. 334; 112 N. W. 658.
>
> *Tarnow v. Carmichael,* 82 Neb. 1; 116 N. W. 1031.
>
> *Currier v. Teske,* 93 Neb. 7; 139 N. W. 622.

Counsel have labored in vain to bring this case within the operation of the treaty of 1900 with Great Britain. But John Toop died in 1897. It is frankly

conceded by them that the law in force at the time of his death must determine who shall take his estate. (p. 30).

Minkler v. Woodruff, 12 Neb. 270.
Stewart v. Russell, 86 N. Y. Sup. 625.
Donaldson v. State, (Ind.) 67 N. E. 1028.
Wunderle v. Wunderle, (Ill.) 33 N. E. 195.
Pilla v. German School Asso., 23 Fed. 700.
Donovan v. Pitcher, 53 Ala. 411; 25 Am. Rep. 634.

Therefore, since there was no treaty in 1897 between the United States and Great Britain, affecting the rights of the English kin, this case must be decided solely upon a construction of the Nebraska laws of descent. *"The question is one of purely local law, and, as such, must be determined by this court."*

Brief of Counsel, p. 49.
Blythe v. Hinckley, 180 U. S. 341.
Lessee v. McCartee, 6 Pet. (U. S.) 102.
Minkler v. Woodruff, 12 Neb. 270.

In cases depending on the laws of a particular state, this court will adopt the construction which the courts of such state have given to its own laws, and such construction will be received by this court as the true construction.

Elmendorf v. Taylor, 10 Wheat. (U. S.) 159.

It is clear from the foregoing authorities that the plaintiffs in error do not come within the protection of the Treaty of 1900, since the title to the land in dispute had already vested in the American heirs prior to the conclusion of the treaty.

The Treaty Did Not Operate Retroactively.

On page 31 of their brief, counsel cite *Hauenstine v. Lynham,* 100 U. S., 483, in support of their contention that the treaty in question operated retroactively. An examination of that case discloses the fact that the intestate there died in 1861, and that the treaty under consideration was negotiated eleven years before, in 1850. Hence, in that case, the question of the retroactive effect of the treaty was not in issue.

As respects the rights of either government under it, a treaty is binding from the date of its signatures, and in this regard the exchange of ratifications has a retroactive effect by relating back to the date of such signatures. But a different rule prevails when a treaty operates on individual rights. A citizen has no means of knowing anything of the terms of a treaty until it is proclaimed by the President. Hence, a citizen cannot be bound by a treaty until it has been both ratified and proclaimed. Property rights of individuals, which have become vested before a treaty has been proclaimed, will not be affected by it. (See cases cited on page 5 hereof).

Nebraska Non-Resident Alien Ownership Act.

If the general law of descent stood alone upon the statute books of Nebraska, there would seem to be no obstacle in the way of the English kin taking their share of the estate as heirs of John Toop, except their common law incapacity to take by inheritance. But there is another legislative act (p. 9), passed in 1889, which has been construed and upheld by the Supreme Court of Nebraska, and which absolutely bars the plaintiffs in error from the right to inherit any part of the land in controversy.

It provides in part:

> "Non-resident aliens . . . are hereby *prohibited* from acquiring title to or taking or holding any lands or real estate in this state by *descent*, device, purchase, or otherwise, . . . except that the widow and heirs of *aliens* who have *heretofore* acquired lands in this state under the laws thereof, may *hold* such lands . . . for a period of ten (10) years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold . . . or such *alien heirs* have not become *residents* of this state, such lands shall revert and escheat to the state of Nebraska."
>
> Rev. Stats. 1913. Sec. 6273.

This particular statute has been construed and upheld by the Nebraska Supreme Court in two cases. The act was expressly referred to and followed in the case of *Toop v. Palmer*, No. 17852, not yet reported, which was decided February 26th,

1915, and which involved the same premises now in controversy before this court. Title to the entire premises was decreed by the Nebraska Supreme Court to be in the American heirs of John Toop. Courts of other states have construed and upheld similar laws prohibiting non-resident aliens from inheriting lands within their respective jurisdictions. Laws having for their purpose the prohibition of non-resident alien ownership are common among the states of the Union.

Glynn v. Glynn, 62 Neb. 872; 87 N. W. 1052.
Dougherty v. Kubat, 67 Neb. 269; 93 N. W. 317.
Toop v. Palmer, (Neb.) No. 17852.
Wunderle v. Wunderle, 144 Ill. 40; 33 N. W. 195.
Ryan v. Eagan, 156 Ill. 224.
Schultz v. Schultz, 144 Ill. 290.
Ahrens v. Ahrens, (Iowa) 123 N. W. 165.
Opel v. Opel, (Iowa) 69 N. W. 560.
Kull v. Kull, 37 Hun. 476 (N. Y.)
Mick v. Mick, 10 Wend. 379 (N. Y.)

2. Counsel's Second Proposition.

It is urged (pp. 38-39) that the act violates the following clauses of the 14th amendment to the Federal Constitution: "Nor shall any state deprive any person of life, liberty, or property, without due process of law"; and, "nor deny to any person within its jurisdiction the equal protection of the laws." (pp. 38-60).

It is sufficient answer to this objection to suggest that plaintiffs in error have not been deprived of any property rights by the law in question. Neither citizens nor aliens have any vested rights of inheritance in the estates of their living kindred.

Wunderle v. Wunderle, (Ill.) 33 N. E. 199.
Donaldson v. State, (Ind.) 67 N. E. 1029.

Reference is made to Section 13, Article 1, of the Nebraska Constitution, which provides that "all courts shall be open and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

We do not understand that the protection of the courts of Nebraska has been denied to the English kin, nor the equal protection of the laws. They have never applied to the courts of Nebraska but have chosen rather to submit their cause to this court, even though they had knowledge that the case of *Toop v. Palmer,* No. 17852, was pending in the state courts prior to the bringing of this suit, and that the state case involved the same premises.

Under counsel's second proposition, it is contended that the act under consideration is special legislation; that it violates Section 15, Article 3, of the Constitution of Nebraska which is:

> "The legislature shall not pass local or special laws in any of the following cases, that is to say . . . changing the law of descent." (p. 52.)

Two grounds are urged why the act is special legislation:

(1) It is claimed that it discriminates against certain non-resident aliens in this manner: That non-resident subjects of those countries with which the United States has treaties so permitting, may inherit lands in Nebraska, while non-resident aliens of other countries, with which no such treaties exist, may not inherit.

(2) It discriminates also, so it is claimed, against non-resident heirs of resident aliens and citizens, since the ten year proviso in section one extends privileges to non-resident heirs of non-resident aliens that are not extended to non-resident heirs of *resident* aliens and *citizens*. (Pp. 38, 39, 51.)

With respect to the first alleged discrimination, counsel argue that the law "places the Russian class in a class that can take, and an Englishman and Irishman in a class that cannot take" and that "that kind of classification is not warranted" under either the Federal or state constitutions.

It is apparent throughout the brief of counsel, that they have followed closely and in numerical order the several objections which were raised and decided (however, adversely to their contentions) in the case of Wunderle v. Wunderle, (Ill.) 33 N. E., 195. The

Nebraska Statute is very similar to, and, in many parts, identical with, the Illinois enactment. It is evident that the former act was patterned after the latter, and that certain clauses and paragraphs were actually taken verbatim from the Illinois law. Therefore, the opinion of the Supreme Court of Illinois, and the constructions placed by that court upon the Illinois act, will be helpful in arriving at a correct disposition of the objections now made to the Nebraska law. We shall quote extensively from the opinion on the several points raised by counsel in the case at bar.

The Illinois statute was, in part, as follows:

> " . . . that a non-resident alien . . . shall not be capable of acquiring title to or taking or holding any lands or real estate within this state by descent, devise, purchase, or otherwise, *except that the heirs of aliens who have heretofore acquired lands in this state under the laws thereof*, and the heirs of aliens who may acquire lands under the provisions of this act, may take such lands by devise or descent, and hold the same for the space of three years, and no longer," etc.

It will be noted that the above clause in italics is identical with the clause we are now considering, except that the word, "widow," appearing in the Nebraska statute, is omitted in the Illinois statute. Hence, the opinion of the Illinois Court is of added force.

The Act is Not Special—Does Not Discriminate.

We will quote from the Illinois case upon the issue of special legislation, as follows:

> "It is said that the act of 1887 is a *special* law, and, as such, violates section 22 of article 4 of the constitution of Illinois, which provides, among other things, that *'the general assembly shall not pass local or special laws . . . for . . . changing the law of descent.'* The act is charged as being special in its character, by reason of its alleged conflict with some of the *treaties* made by the United States with foreign governments. The contentions of counsel upon this point are that there are treaties in force which confer upon the subjects or citizens of certain foreign countries the right to take and hold lands in this country by descent or otherwise; that, inasmuch as the act is overruled by these treaties as to the non-resident aliens so protected by them, its effect is to deprive the non-resident aliens not so protected by the treaties of the right so to take and hold lands in the state, and to leave those who are protected by the treaties in full enjoyment of said right; that there is in this way a *discrimination between the two classes of aliens;* that the act is thus *special*, in that it classifies aliens into those who can take by inheritance and those who cannot take by inheritance."
>
> *Wunderle v. Wunderle*, (Ill.) 33 N. E. 195.

After stating the objections made upon this point, which, the Court will note, are the identical objections now raised against the Nebraska statute, the Supreme Court of Illinois disposed of the matter in this manner:

"If the law can be regarded as special because it does not apply to aliens protected by treaties, its special character in this particular is produced by the treaties and not by its own provisions. The act is sufficiently general in its terms to embrace all non-resident aliens, except those included in the exception specified in section 1 above quoted. The limitation of its general application, arising from the exercise of the treaty-making power of the federal government does not make it special, within the meaning of the state constitution. It is general as applied to all non-resident aliens not protected by treaties. If it had, in express terms, excepted from its operation those citizens or subjects of foreign countries to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still have been a general law as to the large number of non-resident aliens not embraced within the class so excepted. Laws 'are general and uniform in their operation upon all persons in like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation' People v. Wright, 70 Ill. 388."

The court then suggested that "it is not clear that the constitutional prohibition against special legislation was intended to refer to the operation of state laws upon different classes of foreigners, but only to their operation upon different classes among the *citizens* of the state." The court also suggested that it is not clear that the constitutional prohibition against special legislation as to descents in any way forbids such discriminations against

foreigners, for the reason that the *right of inheritance is not an incident of alienage, but rather of allegiance and citizenship.* We shall consider hereafter the point here merely suggested, as to whether or not a non-resident alien, in any event, has a legal right to raise a constitutional question of this sort; whether such questions are not limited to suggestion by citizens only.

In view of the fact that a non-resident alien, under the common law, has no inheritable blood whatever, it certainly is incumbent upon plaintiffs in error to establish some clear and positive statutory law in favor of their case. By express statute, so much of the common law of England as is applicable and not inconsistent with the laws of the state has been adopted as the law of Nebraska. Hence, they will not have established their right to inherit even if they should succeed in establishing the unconstitutionality of the act in question. They must show some positive enactment repealing the common law, under which they are permitted to inherit. This they will not be able to do.

The second charge of discrimination made by counsel, and noted above, was also presented to the Illinois Court in Wunderle v. Wunderle, supra, as applied to the act of that state denying the right of non-resident aliens to inherit. We shall quote from the opinion of the court upon this objection also:

"The act is also charged with being *special* in its character by reason of the exception contained in that portion of section 1 which is above quoted . . . It is said that a special privilege is granted to the non-resident heirs of *aliens* which is denied to those who would be the non-resident heirs of *citizens* but for the disability imposed by the act; that where a citizen of this country, whether such by birth or naturalization, dies owning lands in this state, and leaving kindred in a foreign country who are non-resident aliens, such kindred, though coming within the degrees of relationship authorized to inherit under the statute of descents, cannot take such lands by devise or descent under the act, but that, where a non-resident alien, owning lands before the passage of the act, dies still owning them, and leaving kindred who are non-resident aliens, such kindred, if coming within the degrees of relationship authorized to inherit under the statute, may take such lands by devise or descent, and hold them for a number of years, with the right to sell them. In view of this feature of the act, counsel for appellant say: 'The legislature is forbidden by the constitution from declaring that certain individuals may inherit from one part of the people, viz. deceased *aliens*, and may not inherit from another part, viz. deceased *citizens*.' *We do not regard the objection thus made to the act as tenable.* The object of the exception now under consideration was to save the rights of those *aliens* who had already *'acquired lands in this state subject to the laws thereof,'*—that is to say, subject to the provisions of the act of 1851, as above quoted. *Rules of inheritance are the creatures of the municipal or civil law, and, except as to rights already vested, may be changed and modified at*

pleasure. . . . The legislature has power to change the course of descent, and such change will operate *instantly upon all estates which may subsequently descend.* The *law existing at the time of descent cast* governs the right to inherit. A mere expectation of property in the future is not considered a vested right, and hence 'the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner.' Cooley, Const. Lim. (6th ed.) p. 439; Sturgis v. Ewing, 18 Ill. 176; Crane v. Reeder, 21 Mich. 24; Phila. v. Association, 23 Fed. Rep. 700. *It follows that neither citizens nor aliens have vested rights in the estates of their living kindred.* But aliens who had acquired lands in Illinois before the act of 1887 went into force had vested property rights, which could not be confiscated or taken away from them; and, while it is true that they acquired such lands subject to the right of the legislature to change the law of descents, yet the act of 1851 had not only specifically authorized them to 'transmit the same to their heirs,' but had provided that upon their decease their lands 'should pass and descend in the same manner as if' they were citizens of the United States; and, by the terms of the law, it could not be urged as an objection to them that they were not citizens of the United States, but they were thereby placed upon 'the same footing as natural-born citizens.' Accordingly when the legislature in 1887 repealed the act of 1851, it evidently thought it best to so far continue the privileges of that act to aliens who had acquired lands in Illinois under it and because of it as to confer upon their heirs the right to take by devise or descent a defeasible estate in such lands. *We do not think that the embodiment*

of such a just and reasonable exception in the act of 1887 made it a special law, within the meaning of the state constitution . . . Our conclusion is that the act of 1887 does not contravene the constitutional prohibition of special legislation changing the law of descent."

Wunderle v. Wunderle, (Ill.) 33 N. E. 195.

The reasoning of the Illinois Court is especially pertinent to the case at hand because the identical situation, which is recited in the history of the legislation in Illinois, was confronting the Nebraska legislature of 1889, when the act now in question was passed.

Prior to 1887, and under the law of Nebraska as it existed from 1866 to 1887, *"any alien"* might *"acquire and hold real estate or interest therein, by purchase, devise, or descent,"* and might convey or devise same in like manner as a "native citizen of the United States."

Under the law of 1887 (Chap. 62) *"any alien"* who had theretofore acquired real estate, might convey and dispose of same, and transmit it to his heirs by descent, as though he were a native citizen.

Therefore, at the time of the passage of *the law of 1889,* aliens and non-residents aliens had acquired property and property rights within Nebraska, and it was for the protection of these rights and this property so acquired that the "excepting" clauses were inserted. These excepting clauses were added

so that the act should not be retroactive nor divest vested rights.

The legislature of 1889 was not considering the rights and property of *"citizens,"* it should be remembered, but rather of *"aliens."* And so it was provided that "the widow and heirs of *aliens* who have heretofore acquired lands in this state *under the laws thereof,* may hold such lands by devise or descent for a period of ten (10) years and no longer," etc.

In view of all these facts, it cannot be seriously urged that the law violated the constitution because of being *special legislation. "Moreover, a statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution." "If the constitutionality of a law is doubtful, such doubt must be resolved in favor of its constitutionality."*

Wunderle v. Wunderle, (Ill.) 33 N. E. 195.
Donaldson v. State, (Ind.) 67 N. E. 1032.
Legal Tender Cases, 12 Wall. 457.
Sinking Fund Cases, 99 U. S. 700.
Ogden v. Saunders, 12 Wheat. (U. S.) 212.

The Nebraska Supreme Court has held that "an act is general and not special if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, the classification so adopted by the legislature having a basis in reason and not being purely arbitrary."

Livingston v. Drummond, 49 Neb. 200.

Nebraska Court Has Held Act Not Special.

The charge that the act in question was *special legislation* within the prohibition of the constitution, was submitted to the Nebraska court in the case of Dougherty v. Kubat, 67 Neb. 269, 93 N. W. 317. The court held:

> "It is well settled that the legislature may make a reasonable classification, resting upon the grounds of public policy, or some substantial differences of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. State v. Farmers & Merchants Irr. Co., 59 Neb. 1, 80 N. W. 52; Cleland v. Anderson, (Neb.) 92 N. W. 306. If the statute operates equally upon all persons or objects of a class so constituted, *it is enough.*"
>
> *Dougherty v. Kubat*, 67 Neb. 269; 93 N. W. 317.

3. Counsel's Third Proposition.

It is charged that if the act of 1889 be construed to *prohibit* non- resident aliens from inheriting, then such construction renders the act unconstitutional in view of the fact that the title reads: "An act *restricting* non- resident aliens . . . in their right to acquire," etc. In other words, it is contended that such construction would make the act *broader than its title* and, therefore, unconstitutional.

But this identical question was before the Nebraska Court in the case of Dougherty v. Kubat, 67 Neb. 269, 93 N. W., 317, wherein it was expressly held that the act was "*not unconstitutional as being broader than the title of the act nor as specific legislation.*" The reasoning of the court was as follows:

> "But it is obvious that chapter 15a, Comp. St. (statute adopting the common law) of itself, without any supplementary legislation, was enough to exclude and prohibit ownership of real property by aliens, and that an act leaving them free to acquire and hold city property, while continuing their common law disabilities as to agricultural lands, is, in substance, a restriction of their power as to ownership of lands, substituted for a prohibition. The legislature seems to have assumed that all men had a natural, if not a legal, right to acquire and hold property, and the meaning evidently was that such natural right was to be restricted by law. The common law gave no legal right, and the existing statute in this state, which was repealed, prohibited alien ownership without any exceptions. Hence there was no legal right to restrict. *Taking the words in the sense in which they must have been intended, the title does not conflict with the construction this court has put on the statute*" (that is, in Glynn v. Glynn, 62 Neb. 872).

Dougherty a. Kubat, 67 Neb. 269; 93 N. W. 317.

4. Counsel's Fourth Proposition.

The contention is made that the law, in effect, repeals and amends the general law of descents without any reference therein to the statutes so amended or repealed, and that it is, therefore, violative of the constitutional provision in that regard.

"The answer to this argument is that the act is one complete in itself, and the fact that such act modifies, changes or destroys the effect of other statutes does not render it in conflict with the constitution."

Van Horn v. State, 46 Neb. 79.
State v. Whitmore, 12 Neb. 252.
State v. Ream, 16 Neb. 681.
Stricklett v. State, 31 Neb. 674.
Smails v. White, 4 Neb. 353.
Sovereign v. State, 7 Neb. 409.

5. Counsel's Fifth Proposition.

The fifth point presented by counsel is this: that if the English kin cannot inherit, then the American kin cannot, since they (so it is claimed) must trace their right to take through non-resident alien ancestors, the same as plaintiffs in error.

We desire to show the error contained in this claim also, although it is doubtless sufficient, for the purposes, of this case, to suggest that the question thus raised is entirely foreign to the issues

involved, *since plaintiffs in error must recover, if at all, on the strength of their own title and not on the weakness of the title of their adversaries.*

Reams v. Sinclair, 88 Neb. 738; 130 N. W. 562.
Smith v. Curtice, 73 Neb. 167; 102 N. W. 241.
Abbott v. Coates, 62 Neb. 247; 86 N. W. 1058.
Comstock v. Kerwin, 57 Neb. 1; 77 N. W. 387.
Buck v. Gage, 27 Neb. 306; 43 N. W. 110.

The following excerpts from the brief explain counsel's position in this regard:

> "If the complainants, because aliens and having to trace their right to inheritance through alien ancestors, the heirs of Mary Ann Plowman, who have to trace their right to inherit through the father and mother who were aliens and died as aliens cannot inherit, and therefore, defendants take no title." (p. 70).

> "As the heirs of Mary Ann Plowman or her children have to trace their ancestry through the father of John Toop, may have no inheritable blood at common law, they stand in no better position than the plaintiffs." (P. 75.)

When counsel wrote the above paragraphs, they seem to have entirely mistaken (for the moment) the reason why their clients cannot inherit under the Nebraska law. The cause of the incapacity of plaintiffs in error to inherit is not that their parents, nor yet their grandparents, the father and mother of John Toop, were British subjects. The reason lies rather with *themselves*. They were *residents*

and *subjects of Great Britain when John Toop died.* The statute reads: "*Non-resident* aliens are hereby *prohibited,*" etc.

The incapacity which exists in the English kin is not to be found in the American kin, who were all *resident citizens* of the United States at the time of the death of the intestate.

John Toop was a *resident* of *Nebraska* and a *citizen* of the *United States* at the time of his death. Mary Ann Plowman, the mother of the American next of kin, was for many years, and at the death of John Toop, a *resident* and *citizen* of the *United States.* Mrs. Emily Tremlin and Mrs. Sarah J. Dyer, the grantors of defendants in error, were both *resident citizens* of the *United States.* There can be no question, therefore, that Mrs. Tremlin and Mrs. Dyer were the sole and only next of kin of John Toop, who were qualified to inherit.

Counsel have cited several authorities under this head, but not one is in point. The cases are all to be distinguished either by different local enactments or by facts so entirely different from those at bar that the inapplication of the rules laid down is evident at once upon examination. For example, in the Kansas case (Johnson v. Olson, 142 Pac. 256), cited on page 72, the children of an alien sister, *who was still living,* sought to recover from their uncle. The alien sister of deceased was the immediate *next of kin* under the law of Kansas. She

being *disqualified* and *still living,* the children of course could not take *through* her, nor could they take *immediately* from their uncle, for they were *not* his next kin.

We shall not distinguish the other cases cited, for the right of the American kin to inherit is so clear under the Nebraska law that the cases cited by counsel are distinguishable even from the meagre facts noted in their brief in each instance. Nor do we deem it necessary to refer to the strained and subtle distinctions of the common law with respect to *"mediate"* and *"immediate"* descents. All such are entirely inconsistent with the spirit and purposes of the laws and institutions of Nebraska and are not recognized in that jurisdiction. The American heirs of John Toop took his estate under the statutes as his *immediate "next of kin,"* and not by *representation* of or *through* any other heirs or ancestors of John Toop.

Citizens May Inherit Though Ancestors Were Aliens.

The question is clearly settled in Nebraska. In Glynn v. Glynn, 62 Neb. 872, wherein this very statute was construed, nephews and nieces were permitted to inherit from an uncle, *even though their mother, a sister of the intestate, had lived and died a British subject. Thus the Nebraska court, in this case, permitted such nieces and nephews to inherit*

even though they were compelled to trace their relationship to the intestate through non-resident alien ancestors.

Old Common Law Doctrine—That Citizens May Not Inherit if Ancestors Were Aliens—Not in Force in Nebraska.

The harsh rule of the old common law—that even natural-born citizens may not inherit, if their intervening ancestors were aliens—has never been recognized in Nebraska and is not in force there. Nebraska—we will use the words found in Jackson v. Fitz Simmons, 10 Wend. (N. Y.) 9—"with institutions and policy diametrically opposed to the old feudal doctrine of alienism," has never followed the "harsh operation of an arbitrary rule established centuries ago, under circumstances exactly the reverse of those in which we have been placed," and has never adopted "this old and practically exploded rule of the English law" to be "in full force and operation in this state."

The constitution of Nebraska provides: "No distinction shall ever be made between *resident* aliens and *citizens* in reference to the possession, enjoyment and descent of property." (Sec. 25, Art. 1). This provision—so it is conceded by counsel—grants to resident aliens the right to inherit real estate.

(pp. 62, 83) This right to inherit is a full and complete right. The state of Washington, by its constitution, granted to aliens generally the right to inherit. The Supreme Court of that state, in construing this constitutional grant, held:

> "When our constitution conferred upon aliens the right to inherit, we interpret it to have conferred upon them *a full and complete right of inheritance, which would imply not only the right in themselves to receive by such inheritance from a citizen, but also to receive by inheritance from an alien.* Were we to place any other interpretation upon the constitution, the necessary result would be that, where an alien under its authority, had rightfully acquired a fee simple title to real estate, for instance, by mortgage, or in good faith in the ordinary course of justice in the collection of a debt, and had immediately thereafter died intestate, his heirs, if aliens, would not be able to inherit such real estate, *not because of any disability upon their part, but because their deceased ancestor had no inheritable blood enabling him to transmit title to them.* Such an interpretation would result in a rule of law causing such property to escheat to the state whenever there was a failure of heirs who were citizens of the United States. *No such contingency was contemplated by the framers of our constitution, nor by the people who adopted the same. Our conclusion is that, under our constitution, aliens are entitled to inherit real estate in this state, from, by, or through ancestors whether such ancestors be aliens or citizens.*"

Abrams v. State, (Wash.) 88 Pac. 331.

In view of the fact that not only under the Constitution of Nebraska, but likewise under the law of 1889, resident aliens are expressly permitted to inherit lands in that state, we submit that such resident aliens have had conferred upon them "a full *and complete right of inheritance,*" and that they are "entitled to inherit real estate in this state, *from, by, or through ancestors whether such ancestors be aliens or citizens,*" *residents or non-residents.*

The inevitable conclusion, then, must be, that if resident aliens may inherit "from, by, or through" alien ancestors, certainly resident citizens of the United States must have the same right, for the Constitution of Nebraska expressly provides that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property."

But there is another, and possibly still more convincing reason, why the old common law doctrine in its original form and harshness is not in force in Nebraska.

English Statute 11 and 12 Wm. III, c. 6, in Force in Nebraska Permitting Citizens to Inherit Although Ancestors Were Aliens.

The following is Section 3697 of the Revised Statutes of Nebraska for 1913, which section has been on the statute books since 1866:

"So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be the law within the state of Nebraska."

What is meant by "the common law of England?"

It is apparently well established among the several state jurisdictions that the expression "the common law of England," includes not only the ancient maxims and customs of England—the *lex non scripta*—but likewise so much of the written *statutory law* of England as had been passed in aid of, or to correct defects in, the common law, prior to its adoption in this country, and which statutory law was not merely local in character or inapplicable to American institutions and conditions. The date when the adoption of the English common law was deemed to be complete, in the sense that subsequent acts of Parliament should not be held to affect it, has not been uniform in the various states of the Union.

5 Rul. Cas. Law, 817.
Ann. Cas. 1913 E, 1222.
Clement v. Graham, 78 Vt. 290; 63 Atl. 146; Ann. Cas. 1913 E, 1208.

Under statutes similar to above, it has been held that the "common law of England" included not only the unwritten law, commonly understood by such term, but likewise such *amendatory* acts of Parlia-

ment as were passed, in some instances, prior to the emigration of the colonists to this country, and in others, prior to the final separation from the mother country.

Clement v. Graham, 78 Vt. 290; 63 Atl. 146.
Commonwealth v. Knowlton, 2 Mass. 530.
Wilcox v. Cheriott, (Me.) 42 Atl. 403.
State v. Rollis, 8 N. H. 550.
Browning v. Browning, 3 N. Mex. 371.
Bent v. Thompson, 5 N. Mex. 408.
O'Ferrall v. Simplot, 4 Iowa, 381.
Coburn v. Harvey, 18 Wis. 147.
Patterson v. Winn, 5 Pet. (U. S.) 233.

In Coburn v. Harvey, 18 Wis. 147, it is said:

> "And we have come to the conclusion that in applying this general rule to a state which, like this, had no political existence before the Revolution, it must, in harmony with the reasoning of these cases, be held that when our territorial legislature and framers of our constitution recognized the existence here of the common law, they must be held to have had reference to that law as it existed, *modified and amended by English statutes passed prior to the Revolution.*"

6 Am. & Eng. Ency., note, p. 278.

To same effect:

Browning v. Browning, 3 N. Mex 371.

The statute of 11 and 12 Wm. c. 6 was passed by Parliament in 1700, in order to overcome the harsh rule of the old common law, and to permit subjects of Great Britain to inherit even though

their ancestors were aliens. It is our contention that this statute amendatory of the common law, passed before the Revolution, is a part of the common law which was expressly adopted by statute in Nebraska.

So far as we are aware, the Nebraska Court has never specifically defined or determined just what is comprehended in the term—"the common law of England"—as used in the statute adopting the common law of England. It may be said, however, that the court has never distinguished the unwritten rules from the statutes, which are generally considered as being a part of the common law, nor has the Nebraska Court ever indicated a disposition to confine the application of the term, as used in the adopting statute, to the unwritten rules and to the exclusion of the statutory enactments in modification thereof. In several instances, the Nebraska court has considered, side by side with such unwritten rules, and in connection with the act adopting the common law, specific statutes enacted by Parliament, in modification of the common law, prior to the Revolution. And in two instances, at least, statutes of this nature have been rejected, *not because they were no part of the common law,* but rather because they were *inapplicable to,* or *inconsistent with,* the spirit or conditions of our institutions. And in one instance, the court has expressly referred to the statutes enacted *"before the Revolution"* as a *"part" of the common law.*

Kinkead v. Turgeon, (Neb.) 109 N. W. 745.
In re Creighton's Estate, (Neb.) 84 N. W. 273.
Farmers & Merch. Ins. Co. v. Jensen, 58 Neb. 522.
Meng v. Coffey, (Neb.) 93 N. W. 713.
Williams v. Miles, (Neb.) 94 N. W. 708.

We submit, therefore, that the Statute 11 and 12 Wm. III., c. 6, enacted by Parliament in the year 1700, in modification and amelioration of the harsh common law doctrine existing theretofore, prohibiting citizens from inheriting, if they were required to trace their relationship through an alien ancestor, was a part of the common law of England and was adopted by statute as the law of Nebraska.

That act of Parliament is essentially in harmony with the spirit and institutions of Nebraska. Since Mrs. Tremlin and Mrs. Dyer are both resident citizens of the United States, there is no occasion for applying the early common law doctrine, and its application to them would be entirely out of harmony with the ideals and principles of our laws. *When the reason for the rule fails, the rule itself should fail.*

Kerner v. McDonald, (Neb.) 84 N. W. 92.
Dallugge v. Gocken, 72 Neb. 16.

The point we are now considering was before the Washington Supreme Court in Abrams v. State, supra. By the constitution of that state, the common law of England had been adopted, in so far as applicable and consistent, the same as in Nebraska. We quote from the opinion:

"As above stated, the common law of England was so modified by St. 11 & 12 Wm. III, c. 6, in the year 1700, as to enable English subjects to inherit from an alien. This statute having been enacted prior to the separation of the American colonies from the mother country, *has become a part of the common law of this state,* except in so far as it has been supplanted by our constitution or statutory enactments. *Under this rule and without the provisions of our constitution, a citizen could inherit from an alien an estate held by such alien at the date of his death, even though it had been defeasible.*"

Abrams v. State, (Wash.) 88 Pac. 331.

From the forgoing authorities, we conclude that the St. 11 and 12 Wm. III, c. 6, enacted in 1700, is a part of the common law of Nebraska. If we are right in this view of the matter, then it matters not whether Mrs. Tremlin and Mrs. Dyer take *immediately* from John Toop as his *immediate next of kin,* or whether they take *mediately* by tracing their relationship back through the father of John Toop, who lived and died a resident subject of Great Britain. In any event, their right to inherit is not cut off.

But, the foregoing authorities are unnecessary to support their claim, since, as we contend, they are both natural-born citizens, who took the land in question by inheritance, *direct from John Toop,* as his *sole and immediate next of kin,* who were qualified to take under the statutes of Nebraska.

B. PLAINTIFFS IN ERROR CANNOT RAISE QUESTION OF UNCONSTITUTIONALITY.

As a matter of fact, counsel make no claim that the alleged unconstitutionality of the act has affected or injured any *vested rights* of plaintiffs in error. In this particular, all that counsel claim is that the act is a "rank discrimination against the *people of the state* and denies to *them* the equal protection of the law." (p. 39) Since plaintiffs in error are not among the "people of the state" thus affected there is no contention that this "rank discrimination" affects them. They seem to be in the sole attitude of next friends of the "people of the state," urging these objections in their behalf.

Even if the act should be held unconstitutional, no rights would be restored to plaintiffs in error, for they had no rights to restore. Under the law of 1887, repealed by that of 1889, plaintiffs in error would be in worse plight than they are now. And if the law of 1887 should not be considered as revived, in event the law of 1889 should be held unconstitutional, then plaintiffs in error would be in still worse plight, under the common law, which would still be in force, for they would have no inheritable capacity whatever under the common law, since they are non-resident aliens.

Dougherty v. Kubat, 67 Neb. 269.

Plaintiffs in error are not in a position to complain of the act of 1889, nor may they urge that it is unconstitutional, because no right of theirs is shown

to have been impaired by the enactment of the law of 1889, or of the laws prior therto; and for the further reason, that even if under the law as it existed prior to 1889, they would be entitled to inherit, such right of inheritance is not a *vested right.* There is no hypothesis upon which to ground any right or authority on the part of plaintiffs in error to complain of the act herein considered. They cannot challenge its constitutionality.

Donaldson v. State, (Ind.) 67 N. E. 1033.
Hager v. Reclamation District, 111 U. S. 701
Cooley, Const. Lim. (6th ed.) 196.
Black, Const. Law, 57-58.

C. NO FEDERAL QUESTION INVOLVED IN THIS CASE.

There is not, in fact, a single Federal question involved in this case. The only issue that has even a semblance of a Federal nature is that the Nebraska statute is suspended in its operation with respect to the English kin by the British treaty. But since this treaty was not in existence *at the time of descent cast,* this question is entirely eliminated. Had there been a treaty with Great Britain in 1897 when John Toop died, which provided that British subjects might inherit lands in the United States, then we concede that there would now be a Federal question to determine, namely, the effect of such treaty upon the laws of descent. But since no treaty did, in fact, exist, there can be no such question raised.

D. HOLDINGS OF NEBRASKA COURT MUST GOVERN.

Therefore, since no Federal question is involved, the holdings of the Nebraska Court must prevail on all other questions presented.

The question of the time of the vesting of title upon the death of John Toop is a state question to be determined by the laws and decisions of Nebraska. The question of whether or not the act in question is special legislation is a state question to be determined by the laws and decisions of Nebraska. The question of whether or not the act itself is broader than its title, and therefore, unconstitutional under the state constitution, is a state question to be determined by the laws and decisions of Nebraska. The question of the construction and operation of the laws of descent—to whom property descends upon the death of the owner—is a state question to be determined by the State Supreme Court. There is no question presented therefore by the record which is properly one for this court to consider under the Federal jurisdiction.

This court will follow the holdings of the Nebraska court:

> "This court has uniformly professed its disposition, in cases *depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws.* This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such

department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the constitution and laws of the United States is received by all as the true construction; *and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States. If, then, this question has been settled in Kentucky, we must suppose it to be rightly settled.*"

Elmendorf v. Taylor, 10 Wheat. 159-160.

E. AUTHORITY OF THE STATES TO PROHIBIT ALIEN OWNERSHIP WITHIN THEIR JURISDICTION.

It is competent for any state of the Union to prescribe the rules for the descent of property within its jurisdiction, and who shall inherit in case of the death of the owner, subject always of course, to the restraints of the Federal Constitution, including the limitations of treaties with foreign powers.

The title of aliens to lands within the limits of the several states is a matter of state regulation solely, and the right of foreigners to take and hold title is dependent entirely upon the laws of the state in which the land is situated. *A state may exclude aliens from acquiring property within its boundaries as its safety or public policy may direct.*

Chirac v. Chirac, 2 Wheat. 259; 4 U. S. (L. ed.) 234.
Beard v. Rowan, 9 Pet. 301; 9 U. S. (L. ed.) 135.
Anthorp v. Backus, 1 Am. Dec. 26.
Wunderle v. Wunderle, 33 N. E. 195; 19 L. R. A. 84.
Ann. Cas. 1912 A, 857 (note).
DeVaughn v. Hutchinson, 165 U. S. 566.
Clarke v. Clarke, 178 U. S. 186.
Blythe v. Hinckley, 180 U. S. 186.

"The law of nations recognizes the liberty of every government to give to foreigners only such rights" touching real estate, "as it may see fit to concede . . . In our country, this authority is primarily with the states where the property is situated."

Hauenstein v. Lynham, 100 U. S. 484.

"Every state and sovereignty possesses the power of regulating the manner and terms upon which property, real or personal, within its dominion, may be transmitted by inheritance or last will and testament, and of prescribing who shall and who shall not be capable of transmit-

ting or taking it. The power to transmit or take property by descent or devise is a creature of law, and not a natural right."

Donaldson v. State, (Ind.) 67 N. E. 1030.
Plummer v. Coler, 178 U. S. 829.
Myer v. Grima, 8 How. (U. S.) 490.
U. S. v. Fox, 94 U. S. 315.

F. CONSTRUCTION OF THE ACT OF 1889.

Now that we have established, as we believe, the *validity* of the act itself, how shall it be construed? What are the rights of plaintiffs in error thereunder?

When the legislature of a state has prescribed the course of descent, property descends in the manner prescribed and to those only whom the legislature has seen fit to clothe with the right of inheritance. All others are excluded. In case of real estate, the title vests immediately, upon the death of the owner, in the heirs designated by the statutes, and in none other. We have already referred to the general statute of descents and have cited cases as to the immediate vesting of title thereunder. (See pp. 5-6 herein.)

Now, as an exception, or supplementary act, to the general law of descent in Nebraska, we have a statute which prohibits non-resident aliens from acquiring title to or taking or holding real estate by descent, but which provides that the widow and heirs of *aliens,* who had acquired title *before* the passage of that act, may hold the same for ten years, upon

condition that if, at the end of that time, they have not sold it, or become residents of the state, it shall then escheat to the state. A subsequent section prescribes the procedure for foreclosing the rights of foreign heirs, where the land has escheated.

As to such as do not not come within the provisos, the title never vests in them, because they cannot take by inheritance, and the title vests immediately in such as can take. As to those who cannot take, no step is required to divest their title because they never had any. As to such as do, however, come within the provisos, the title vests in them, *subject to defeasance* in case it is not disposed of within the time prescribed, or such takers do not become residents of the state. As to this class, affirmative action on the part of the state is required to divest their title. Their title is good as against all except the state, and only the state can question it. And the state can extinguish it only by the procedure prescribed by the statutes.

Carlow v. Aultman, 28 Neb. 672.

Counsel have misconstrued the effect of the above case. They have cited it in support of their contention (p. 31) that "only the state could object to the holding of this real estate by the plaintiffs in error." The Nebraska case in no way supports their position. Before counsel may rely upon that case, they must first show that complainants took *by inheritance* an interest in the land in dispute, or *by purchase* under some one of the provisos to

the act under consideration. In other words, the above case does not assist them *to take,* but only *to hold, after* they have taken.

In that case, Aultman & Company *purchased* real estate at a judicial sale *"in order to protect its lien." Even under the earlier and more stringent rules of* the common law, unmodified and unameliorated by statutes, an alien—even a non-resident alien—could take a defeasible title *by purchase* and *hold* same against all except the crown. The Nebraska case did not involve the right of a non-resident alien to take *by inheritance* and is not in point in this connection. Furthermore, it was decided under another statute and before the present act was passed.

6. Counsel's Sixth Proposition.

It is urged, in construing the act in question, that complainants took a *defeasible title* to an undivided two-thirds interest in the land in question and that their title is good against all *except the state.* (P. 88 et seq.)

Under this head, counsel argue that the act should receive a *liberal* construction in favor of the English kin; that they come within the first exception contained in section one of the act. In other words, this court is asked to extend the application of the first proviso so as to include non-resident heirs of *citizens* (John Toop being a citizen) as well as non-resident heirs of *"aliens."*

Act Will Be Strictly Construed.

We are fortunate in being able to turn again to the well considered case of *Wunderle v. Wunderle, supra,* from which we have already quoted extensively hereinbefore. This identical question was before the Illinois court and we quote its conclusion as follows:

> "It is urged that the act of 1887 should be liberally construed, and that such liberal construction would have the effect of *extending* the *exception* named in section 1 to the alien heirs of *citizens,* as well as to the heirs of *aliens;* in other words, we are asked to so construe the exception as to give the non-resident alien kindred of *citizens* the right to take lands by descent or devise, and hold the same for three or five years, so as to make sale, or acquire an actual residence in the state. *This would involve the insertion of the words " and the alien heirs of citizens" after the words "except that the heirs of aliens." By such a construction we would make the legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them, and pass upon their validity."*

> "But here the legislature has expressly declared that the heirs of certain aliens shall take and hold land for limited periods, subject to the privilege of avoiding escheat to the state by a sale of them, or by acquiring an actual residence in the state, within said periods. *But the act of 1887 nowhere declares,* nor is there anything on its face to indicate, that the *legislature intended thereby* to declare that the non-resident alien kindred of *citizens* should so take

and hold lands for certain periods. *The evident design of the legislature was to prevent the accumulation of landed estates in the hands of non-resident aliens.*"

Wunderle v. Wunderle, (Ill.) 33 N. E. 201.

Complainants Did Not Take Even a Defeasible Title.

It is claimed that the title taken by the English kin was defeasible and good against everyone until the state interferes. This point was also put to the Illinois court with the following result:

"It is claimed that the appellants in this case took such an interest in the lands in controversy as they can hold until the *state interferes* with them, and that the interest so taken by them must be regarded as valid until it is assailed in a *direct proceeding instituted by the state.* We are unable to yield our assent to this proposition. At common law, though aliens could not take by *operation of law,* . . . they yet could take by grant or devise until office found; that is to say, an alien could hold lands conveyed or devised to him, until it was ascertained by inquiry or inquest of office whether or not such lands belonged to the sovereign by reason of the alienage of the holder. Hauenstein v. Lynham, supra; Cross v. De Valle, 1 Wall. 13; 3 Bl. Comm. 258; 1 Wash. Real Prop. (5th Ed.) p. 79; 1 Am. & Eng. Enc. Law, 458-460. Hence it has come to be generally held that, in the absence of express statutory provisions to the contrary, an alien's title to land *purchased by him or devised to him* is valid against everybody but the state, and can be divested only by 'office found,' or by some other act or proceeding taken by the state for such purposes of acquiring possession.

"Inasmuch, therefore, as the appellants cannot *inherit* from their deceased brother by reason of their *alienage, the interest in the land which would otherwise have gone to them, descends to the next of kin competent to take under the statutes of Illinois.*"

Wunderle v. Wunderle, (Ill.) 33 N. E. 201.

Taking by Inheritance and by Purchase Distinguished.

Counsel have cited several cases (pp. 44-50) in support of their contention upon this point, but an examination discloses that such cases were decided under local statutes expressly permitting non-resident aliens to *inherit;* as, for instance, in the Missouri case (*Pembroke v. Huston,* p 44), wherein the statute expressly provided that it was to apply to real estate of aliens "except such as may be *acquired by inheritance.*" (P. 45.)

It is not to the point for counsel to cite cases holding that non-resident aliens may take *by purchase* and then *hold* against all but the state. This right, they had even under the most rigid common law rules. Counsel must cite authorities to prove that their clients, under statutes like that of Nebraska, may take *by inheritance,* and this they have not done in a single instance. In every case referred to by counsel on pages 44 to 45 inclusive, the claimants were those who were claiming *by purchase* (devise being included therein), and not by descent or inheritance.

Counsel argue that the Nebraska statutes have "placed *inheritances* in the same class as *purchasers*

and grantees. Heirs take by *descent* and *hold until office found."* (P 44.) We challenge them to cite a single authority to support this statement.

On page 30, they say that "there is a *broad distinction* between taking *as heir* and being qualified to hold and retain real estate" after once taken. Further, "none of the heirs of John Toop were entitled to take or hold any real estate until the death of the widow." (P. 30.) But they have entirely failed to note the "broad distinction" really referred to in the authorities cited. The broad distinction is not "between taking *as heir* and the right to *"hold" after taking*, but rather between "the right *to purchase"* and the "right *to hold lands,"* after purchase. (P. 31.)

Runyon v. Lessee, 14 Pet. 122 (cited).

Excerpts from opinions in these cases are quoted in support of their contention that complainants may take *"as heirs"* (p. 30), whereas the cases all involve taking *by purchase* and not *by descent or inheritance.*

Hauenstein v. Lynham, 100 U. S. 484.

The same error is noted at pages 58 and 86 where reference is made to the case of *Bahaud v. Bize,* 105 Fed. 485, decided by Judge Munger, and which involved the Nebraska statutes in connection with a French treaty. But that case in no way supports counsel's contention, namely, that Nebraska is one of the states of the Union which authorizes non-resi-

dent aliens to inherit. It simply is to the effect that Nebraska is one of the states which permits such aliens *to hold* after *purchase* or after *inheritance* as provided in the *exceptions* to the act.

But while the authorities are plentiful that an alien, aside even from the statutes, may take by *purchase* (including devise at common law) and may hold, as against all but the state, these authorities are not helpful in this case, and tend only to confuse the real issues. Authorities are just as numerous that an alien, at common law, could neither take nor transmit title to real property by descent, and that he could do neither without statutory authority.

Donaldson v. State, 67 N. E. (Ind.) 1030-1; (and numerous cases cited therein).

Plaintiffs in error did not take even a defeasible title.

Wunderle v. Wunderle, 144 Ill. 40; 33 N. E. 195.
Ryan v. Eagan, 156 Ill. 224.
Schultz v. Schultz, 144 Ill. 290; 33 N. E. 202.

We deem it well here to give an abbreviated outline or synopsis of the law under consideration, eliminating therefrom any and all parts not directly involved in its construction. In doing so we will be the better able to set forth clearly the six different provisos or exceptions therein contained. It will be apparent at once that plaintiffs in error do not come within any of the provisos mentioned.

ACT OF 1889.

"NON-RESIDENT ALIENS . . . ARE HEREBY PROHIBITED FROM ACQUIRING TITLE TO OR TAKING OR HOLDING ANY LANDS OR REAL ESTATE IN THIS STATE BY DESCENT, DEVISE, PURCHASE, OR OTHERWISE, ONLY AS HEREINAFTER PROVIDED,

EXCEPT:

(Proviso No. 1.) "That the widow and heirs of *aliens* who have *heretofore* (prior to March 16th, 1889) acquired lands in this state *under the laws thereof,* may *hold* such lands by devise or descent for a period of ten (10) years and no longer" during which time such lands must either be sold or *"such alien heirs"* must become residents of the state. Otherwise, escheat to the state.

(Proviso No. 2.) "Any non-resident alien who owns land in this state *at the time this act takes effect,* may dispose of same during his life," etc.

(Proviso No. 3.) "This act shall not . . prevent the *holders,* whether non-resident aliens or corporations . . . of *liens* upon real estate or (upon) any interest therein, whether heretofore or hereafter acquired, from holding or taking a valid title to the real estate (which is) subject to such *liens,* nor shall it prevent any such alien . . . from *enforcing* any *lien* or *judgment for any debt or liability now existing.*

or which may hereafter be *created,* nor from becoming a *purchaser* at any *sale* made for the purpose of *collecting* or *enforcing* the *collection* of such *debt* or *judgment* . . . "

(Proviso No. 4.) "That the provisions of this act shall not apply to the real estate necessary for the construction and operation of railroads."

(Proviso No. 5.) Nor to real estate necessary for "manufacturing establishments."

(Proviso No. 6.) Nor to "any real estate lying within the corporate limits of cities and towns."

Comp. Stats., (Nebr.) 1889, secs. 70-73.
Rev. Stats., (Nebr.) 1913, secs. 87-90.

This court is asked to give a liberal construction to the foregoing act, so as to include the complainants herein within the first proviso. To do so, a construction is asked which will require the court to insert in the first proviso the words "and the alien heirs of *citizens*" just after the words, "except that the heirs of *aliens.*" We have seen that the Illinois court in *Wunderle v. Wunderle, supra,* declined thus to legislate and confined itself solely to construing what the legislature had enacted. As was well said in *Douglas v. Cameron,* 47 Neb. 361:

"With the wisdom or justice of the statute we have nothing to do. The statutes of descent are creations of positive law, and effect must be

given to them according to their obvious meaning, regardless of contingencies which the court might think the legislature should have provided for, and regardless of our own notions of abstract justice."

Douglas v. Cameron, 47 Neb. 361.
Shellenberger v. Ransom, 41 Neb. 631.

"Where the language of the statute is clear, it is not for the court to construe it so as to embrace cases because no good reason can be assigned why they were excluded from its provisions."

26 *Ency. of Law.* (2nd Ed.) 601.

But the Illinois court considered that the legislature had doubtless acted wisely in thus eliminating the *"heirs of citzens"* from the proviso, and had possibly been prompted to do so in order to encourage the naturalization of resident aliens.

"The act holds out inducements to *resident aliens to become citizens* by granting them the privilege of acquiring lands and retaining them for certain periods after declaring their intentions to become citizens, and by providing for escheats to the state in case of failure to sell or to acquire citizenship within such period. We cannot say that the failure to provide for the non-resident alien kindred of *citizens* may not have been in pursuance of the general design to *encourage the naturalization of resident aliens,* and to *discourage* the ownership of land by non-resident aliens. *Non constat* that it was not the intention of the legislature to induce citizens

to devise their lands to their resident kindred, or, in case of intestacy, to transmit them to heirs living in this country. *We are of the opinion that the exception in section 1 should not be so construed as to embrace others than the class of persons specifically designated. Luhrs v. Eimer,* 80 N. Y. 171."

Wunderle v. Wunderle, 33 N. E. 200.

The construction of similar statutes was under consideration in numerous cases in the early history of New York, and the same objection was there urged to the statute as is being urged now by plaintiffs in error, namely, that the legislature could not have meant to pass a law more favorable to the non-resident widow and heirs of *aliens* than to the non-resident widow and heirs of *natural born citizens. In every instance, however, the courts of that state held that the language of the statute must control.*

Larreaux v. Davignon, 5 Abb. Pr. (NS) 367.
Currin v. Finn, 3 Denio, 229.
Connolly v. Smith, 21 Wend. 59.
Mick v. Mick, 10 Wend. 379.
McCarty v. Terry, 7 Lans. 237.

In *Mick v. Mick, supra,* it is said by the court that the legislature with all its liberality toward the alien heirs and widow of *aliens* has made no provision "for the alien widow of a natural born *citizen.*"

The rule laid down in the foregoing decisions is a most familiar one. It is universally held that *"the court will not read into a statute exceptions that are not made by the legislature."*

Siren v. State, 78 Neb. 778; 111 N. W. 798.
U. S. v. Musgrove, 160 Fed. 700.

Strict Construction of Provisos.

The construction asked by counsel for plaintiffs in error is in direct violation of the general rule for the construction of provisos to statutes.

> "A proviso, in a statute, is *strictly* construed, and takes no case out of the enacting clause which is not fairly within the terms of such proviso."
>
> *United States v. Dickson,* 15 Pet. 54.

> "Provisos of this character are not intended to *impair* or *destroy the main purpose,* nor to *enlarge* the meaning or effect of the statute to which they are added, but, on the contrary, to *exclude* from the operation thereof something that might otherwise come within its scope."

> "Where such purpose is apparent, they are *strictly construed,* and their scope limited to avoid a result manifestly not in harmony with the legislative intent."
>
> *State v. Twin City Tel. Co.,* (Minn.) 116 N. W. 837.

> "Where the enacting clause is *general* in its language and objects, and a proviso is afterwards introduced, the *proviso is construed strictly* and takes *no case* out of the enacting clause which does not fall fairly within its terms."
>
> 26 *Am. & Eng. Enc.* 680.

To same effect:

Boston Trav. Co. v. Purdy, 137 Fed. 717.

"The primary and usual office of a proviso is to *except* something out of a statute which would otherwise be within it."

Deitch v. Staub, 115 Fed. 409.

"In the construction of a statute, an exception to its provisions not suggested by its terms should not be introduced by consideration of mere convenience."

Coal Co. v. Doncley, 73 Ohio St. 298.

Effect of Provisos.

It is urged on page 95 and following, that the several provisos bear out counsel's construction, namely, that plaintiffs took a *defeasible title.* It is suggested that use of the words, "devise, descent or purchase," together indicates that the legislature made no distinctions among them.

It is contended that the 4th section of the act, being proviso 3 in the outline just given, also confirms their position as correct.

An examination of this section shows conclusively that it refers solely to *"holders"* of *"liens"* upon real estate or upon interests therein, and that its only purpose is to protect such holders in the enforcement and collection of their liens. An examination of these several provisos shows that the legislature had in mind the protection and preservation not only

of vested property rights and interests existing at the time of the enactment, but, likewise, the protection of *lien holders* who might thereafter, in the course of business, become entitled to such protection *"for the purpose of collecting or enforcing the collection of such debt or judgment."*

We contend that the proviso numbered one is intended to protect the right of *aliens* (not of the *widow* and *heirs*) who *had already "acquired"* lands in Nebraska *"under the laws thereof."* It should not be forgotten, in this connection, that "under the laws thereof" prior to 1887, *"any alien"* might *"acquire and hold real estate or any interest therein, by purchase, devise, or descent,"* and might convey or devise same as if he were a "native citizen of the United States." (P. 18.) Also, that even under the law of 1887, *"any alien"* who had theretofore *acquired* real estate, might convey and dispose of same, and the same might descend to his heirs, the same as if he had been a native citizen.

Therefore, it was clearly for the purpose of protecting the vested rights of such *aliens* who had already *acquired* real estate under the laws of Nebraska, and to prevent the retroactive effect of the act of 1889, that provisos one and two, and, in fact, number three were attached thereto. It was not for the purpose of protecting the vested rights of those who might inherit, nor yet of those to whom conveyances might be made by deed or will, that the provisos were

made, for such expectant heirs or prospective grantees and devisees had no *vested* interests to protect. *Such rights are not vested rights.*

Wunderle v. Wunderle, (Ill.) 33 N. E. 199.
Donaldson v. State, (Ind.) 67 N. E. 1029.

It is our contention, therefore, that the use of the words, "acquire" and "acquired," in each and all of the provisos, has a limited and restricted meaning: that these words are used to mean acquire by *purchase* (devise so construed) *only,* and *not* by *inheritance.*

Specifically, then, applying this construction (for example) to the fourth section of the act (proviso number three in outline), it is our contention that this section in no way lends assistance to counsel in the construction which they have sought to place upon the entire act. The only parties contemplated by that section, and the only ones protected thereby, were, those who had acquired or might acquire, liens on real estate, or liens on *interests* therein, by some manner of conveyance, contract, mortgage, judgment, deed, or other act of *purchase.*

To "Acquire" Means to Acquire by Purchase Only—Not by Inheritance—As Used in Provisos.

All of the provisos clearly show that the legislature contemplated, by the use of the word "acquire," the acquisition of property by *purchase* and *conveyance* (devise included), and *not by inheritance;* that it was not the intention of the legislature, by means

of the provisos, to enlarge *generally* the right of non-resident aliens to inherit. In this we are well supported by the Supreme Court of Iowa in an opinion construing a law very similar to our own.

The statute of Iowa was, in part, as follows:

> "Non-resident aliens . . . are *prohibited* from *acquiring* title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise only as herein after provided . . . (then follows the first excepting clause very similar to that in the Nebraska law).
>
> "Any non-resident alien may *acquire* and hold real estate to the extent of 320 acres . . . providing . . . " he shall dispose of same as specified.

The Iowa court in constructing this latter *proviso* or *exception* says:

> "It is also said by appellant that a ' proviso will generally be considered not to enlarge, but rather to restrain, qualify, or explain the clause to which it refers. Our conclusion is an application of the rule. We limit the word *'acquire'* by the proviso to what is in law a *purchase*, without which it would embrace the whole range of acquisitions, which includes all methods."
>
> *Bennett v. Hibbert,* (Iowa) 55 N. W. 93.

The above construction was re-adopted in a later case, the court saying:

"In construing the words *'acquire'* and *'purchase,'* as used in the *exceptive clauses* of the statute, we said, "we limit the word *'acquire'* by the proviso to what is in law a *purchase,* without which it would embrace the whole range of acquisitions, which includes all methods." It is apparent that, if the construction appellants would have us adopt in this case be the true one, that much of what is said in the last opinion cited is useless, for if the word 'acquire' as used in the statute relied upon, *means any kind of acquisition,* then it was entirely unnecessary to determine whether the word should be limited by the terms 'purchase' or 'purchaser,' found in the same section of the statute. But let us look to some of the rules laid down for the interpretation of statutes. It is our purpose to arrive as nearly as may be at the intent of the legislature in enacting this statute; for this is the leading, if not the only, object to be inquired into by courts. In arriving at this intention the language of the act, and the particular words used, must be construed with reference to their connection, and the purpose and object in view in enacting the statute. We have seen that, before the passage of the act in question, non-resident aliens had the same right to acquire, hold and enjoy property as citizens of this state. The policy of this law was questioned, and hence the repeal of section 1908 and 1909 of the Code of 1873, and the enactment of the alien law by the twenty-second general assembly absolutely prohibiting non-resident aliens from acquiring real estate in Iowa save as permitted thereby. The act is entitled, "And act *restricting* non-resident aliens in their right to acquire and hold real estate, etc. The act not only prohibits them from 'acquiring' title to land, but also dis-

qualifies them from 'holding' or 'taking' title to any Iowa real estate.

Under section 2 of the act, a non-resident alien may "acquire and hold" 320 acres of land, provided that, within five years from the date of purchase, it is placed in the possession of a relative of such purchaser; such occupant to become a citizen within 10 years from the purchase. We are then brought to the question as to *how the non-resident alien must acquire the land in order to hold it under the provisos of the statute.* Must he be a purchaser, or may he hold *when he takes by descent?* It is a general rule of construction that a provision will not *enlarge, but rather restrain, qualify,* or *explain,* the clause to which it refers. It seems to follow, then, that when the statute permits an alien to *acquire real estate,*—not to take,—providing that within five years from the date of "purchase" it is placed in the possession of a relative of "such purchaser," who is to become a naturalized citizen within 10 years from the purchase, the mode of acquisition is restricted to that *of purchase,* and cannot be enlarged *to embrace descent.* Construing the whole act together, it is manifest that this was the intention of the legislature. Any other interpretation of the language used would largely moderate, if not entirely destroy, the force and effect of the language used in the first section of the act. Again, under the common law a non-resident alien could acquire property by purchase, grant or devise, but he *could not take by descent.* King v. Ware, 53 Iowa 97; 4 N. W. 858; Brown v. Pearson, 41 Iowa 481. Now, it was evidently the intention of the legislature to take away from these persons the right to acquire or hold land by purchase or descent,

> excepting upon certain conditions mentioned in the act. It certainly *was not its purpose* to give to non-resident aliens greater rights than they had at common law, and allow them to take by descent.
>
> *Burrow v. Burrow,* (Iowa) 67 N. W. 288.

We submit that the reasoning of the Iowa court is convincing and peculiarly pertinent to a construction of the provisos in the Nebraska law.

When the legislature of Nebraska enacted in Section 1 of the act, that *non-resident* aliens are hereby *"prohibited"* from "acquiring" title by "descent," and then, in proviso 3, permitted the *"holders"* of *"liens"* either on "real estate" or of *liens* "on any interest therein," to take title to such real estate (which is) *"subject to such liens,"* and to enforce such "liens or judgment for any debt or liability," for the purpose of "collecting" such "debt or judgment," it certainly cannot be fairly nor forcefully urged that it was the intention of the legislature, by such proviso, to throw down the bar to non-resident alien ownership, set up in section one of the act, and *permit* such non-resident aliens to *inherit generally,* even a defeasible title, in direct disregard of the *absolute* "prohibition" contained in the first section. And the same reasoning applies to all of the provisos.

Complainants must bring themselves fairly and clearly within some one or more of the *excepting provisos* of that act, or else they cannot take, because they are *non-resident* aliens, who, by express

terms of the act, "are hereby *prohibited*" from acquiring title by "*descent*" or "*otherwise*," "except" they come within one or more of the provisos.

Were they "heirs of *aliens*" who had acquired lands in Nebraska "under the laws thereof?" No, for John Toop was a *resident citizen.* Did they "*own lands in this state at the time this act*" *took effect?* No, they make no such claim. Were they, or are they now, "*holders*" of "*liens*" on this "*real estate*" or "*on any interest therein?*" They possess no such "lien or judgment" or "liability." Is this "*real estate necessary for the construction and operation of railroads*" or "*manufacturing establishments?*" It does not so appear. Or, finally, does it lie "*within the corporate limits of cities and towns?*" No, it is conceded that the property is farm land. Then how—under what possible construction of the act, either in its entirety, or in its several parts or provisos—may these complainants hope to prevail in this cause?

G. INDISPENSABLE PARTIES NOT IN COURT.

In the printed suggestion filed herewith, in which request was made for permission to file this brief, we included a full copy of the opinion of the Nebraska Supreme Court, rendered February 26th, 1915, in a case wherein William I. Toop, Jesse J. Toop, Florence Behrend, Emily Tremlin, Sarah J. Dyer, being the American kin of John Toop, and others, were plaintiffs, and Frank Palmer, Ulysses Land Company and the Northwestern Mutual Life Insurance Company, were defendants.

That case involved the identical premises in dispute in this suit, and the defendants in error, herein, the Ulysses Land Company and the Northwestern Mutual Life Insurance Company, were defendants therein.

The courts of Nebraska in that case have quieted title to the very premises, now in controversy herein, in William I. Toop and Mrs. Emily Tremlin, subject to certain rights by contract in favor of Mrs. Dyer. These parties are not before this court. The Nebraska case was begun June 9, 1911, while this suit was not begun until January 31st, 1912. Plaintiffs in error had full knowledge, before commencing this suit, of the claims of the American kin and of the pendency of the state case. The Ulysses Land Company has absolutely no interest whatever in the premises.

We submit that William I. Toop, Emily Tremlin and Sarah J. Dyer were, and are, absolutely indispensable parties defendant in this suit, without whose presence this Court is powerless to proceed to any decree whatever, except a decree of affirmance of the lower court's decree, or a dismissal of the present appeal.

The interests of these parties is of such a nature that no other disposition of this case can be made without injuriously and irrevocably affecting the interests of such absent parties. This court is, therefore, powerless to do otherwise than affirm the lower court's decree or dismiss the appeal.

16 *Cyc.* 181-189.
20 *Cyc.* 392, 715.
Shields v. Barrow, 19 How. (U. S.) 137.
Cameron v. M'Roberts, 3 Wheat. (U. S.) 591.
Cushing v. Schoenemann, 1 Neb. (Unof.) 482.
Sturgis v. Miller, 79 Neb. 404.
McHugh v. Smiley, 17 Neb. 620, 627.

And even if it should be suggested that, by reason of diverse citizenship, or otherwise, it is impossible to bring these parties into court, nevertheless, the indispensability of their presence here is such as to preclude this Court from rendering any decree or making any disposition whatever of the case which would be adverse to their interests.

Shields v. Barrow, 17 How. (U. S.) 137; (and authorities cited last above.)

For the reasons herein urged, we respectfully submit that the decree of the lower court should either be affirmed, upon the merits, or the appeal, dismissed.

Respectfully submitted,

R. C. Roper,
C. M. Skiles,

Attorneys and Amici Curiae.